RECORD AND BRIEFS

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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BANK OF AMERICA CORP., ET AL.,
Petitioners,

v.

CITY OF MIAMI, FLORIDA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID J. ZIMMER
GOODWIN PROCTER LLP
Three Embarcadero Ctr.
24th Floor
San Francisco, CA 94111

WILLIAM M. JAY
Counsel of Record
THOMAS M. HEFFERON
MATTHEW S. SHELDON
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

Counsel for Petitioners

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QUESTIONS PRESENTED

This case concerns who may sue under the Fair Housing Act ("FHA"), and for what types of injury. The FHA, like Title VII, requires that a plaintiff be an "aggrieved" person. A plaintiff is "aggrieved" under Title VII only if the person falls within Title VII's "zone of interests." *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011). But here, although the FHA's language is "nearly identical," the Eleventh Circuit held that the FHA must be interpreted differently—to allow any plaintiff with constitutional standing to bring an FHA suit, even if that person's claim is far outside the zone of interests Congress sought to protect through the FHA. The Eleventh Circuit also held that an FHA plaintiff can adequately allege proximate cause even when the alleged injury is entirely indirect.

These holdings allowed the City of Miami to pursue a remarkably attenuated theory of recovery under the FHA: the City seeks to recover money damages from petitioners, residential mortgage lenders, on the theory that petitioners engaged in discriminatory loan practices, some of those loans fell into default, some defaults led to foreclosures, some foreclosures caused neighborhood blight, the neighbors' decreased property values led to decreased tax revenue, and blight increased the cost of services such as police.

The questions presented are as follows:

1. By limiting suit to "aggrieved person[s]," did Congress require that an FHA plaintiff plead more than just Article III injury-in-fact?

2. The FHA requires plaintiffs to plead proximate cause. Does proximate cause require more than just the possibility that a defendant could have foreseen that the remote plaintiff might ultimately lose money through some theoretical chain of contingencies?

PARTIES TO THE PROCEEDING

Petitioners in this Court are Bank of America Corp.; Bank of America, N.A., in its own capacity and as successor by *de jure* merger with Countrywide Bank, FSB; Countrywide Financial Corp.; and Countrywide Home Loans, Inc. The only respondent is the City of Miami, Florida.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Bank of America Corp., Bank of America, N.A., Countrywide Financial Corporation, Countrywide Financial Corporation, and Countrywide Home Loans, Inc. (collectively, "Bank of America") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a) is reported at 800 F.3d 1262. The decision in the companion case against Wells Fargo is reported at 801 F.3d 1258. The district court's decisions granting petitioners' motion to dismiss (Pet. App. 58a) and denying Miami's motion for reconsideration (Pet. App. 77a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2015. A petition for rehearing was denied on November 4, 2015 (Pet. App. 56a). On January 25, 2016, Justice Thomas extended the time within which to file a petition to and including March 4, 2016. No. 15A766. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 3613(a)(1)(A) provides:

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2

> years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

The full text of Section 3613 and other relevant statutes are reprinted in the Appendix, *infra*, at Pet. App. 84a.

INTRODUCTION

Federal statutes limit both the plaintiffs who may sue (only those within the "zone of interests") and the injuries for which they may seek to recover (only injuries "proximately caused" by a violation), unless Congress expressly relaxes those limits. This Court reaffirmed both of those important statutory limits in the last few years—unanimously. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *Thompson v. North American Stainless, LP*, 131 S. Ct. 863 (2011).

But the court of appeals in this case did not follow these principles. It felt constrained by a 1972 decision of this Court, *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205 (1972), not to apply either of those limits to the Fair Housing Act ("FHA") as it would to other statutes. Even though this Court has interpreted materially identical who-may-sue language in Title VII to *require* a zone-of-interests limitation, the court of appeals believed that *Trafficante* and two follow-on cases still bind lower courts to hold that an FHA plaintiff need only show that it has Article III standing. And the court

of appeals applied only a weak proximate-cause test that turns entirely on foreseeability, unlike the one applied in other circuits and by this Court. With both threshold limits stripped away, petitioners now face a set of FHA lawsuits by plaintiffs who experienced no discrimination, but are demanding hundreds of millions of dollars based on a multi-step theory of causation that would have made Rube Goldberg proud.

The FHA plaintiff here is the City of Miami. The City did not buy a house or take out a mortgage, and it did not experience any racial discrimination or even any actionable "disparate impact." Nor does it contend that its neighborhoods have become more or less segregated or that any "discriminatory housing practice" was visited upon it.

Like most U.S. cities during and after the late-2000s financial crisis, Miami experienced a drop in property-tax revenue as property values decreased with the economic disruptions. Although it is not a victim of lending discrimination, Miami wants to use the FHA to make Bank of America and other financial institutions replace that revenue. Other cities and counties are doing the same thing in other cases like this one. These suits were the brainchild not of the local governments themselves, but a group of plaintiffs' lawyers that have brought nearly-identical suits on behalf of municipalities across the country.[1]

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[1] At least twelve cities and local governments have brought suit, including Baltimore, Maryland; Birmingham, Alabama; Cobb County, Georgia; Cook County, Illinois; DeKalb County, Georgia; Fulton County, Georgia; Memphis, Tennessee; Miami, Florida; Miami Gardens, Florida; Los Angeles, California; the Los Angeles Unified School District, California; and Shelby

Miami and the other governmental plaintiffs theorize that they can recover compensatory and punitive damages under the FHA for a supposed injury resulting from a long causal chain that goes like this: They allege that, as a statistical matter, the banks provided loans to minorities on less favorable terms than to non-minorities; that some of those loans defaulted because of those allegedly-discriminatory terms; that some of those defaults led to foreclosures; that some of those foreclosures led to decreased property values not only at the foreclosed property but at other nearby properties as well; and that those decreases in property values in turn led to decreased tax revenue (and increased municipal-service costs) for the city government.

While the evidence would demonstrate that Bank of America engaged in no discrimination, Congress never granted *this plaintiff* the right to force lenders into court to litigate the issue. Under *Thompson*, Miami plainly could not be "aggrieved" under Title VII based on lost tax revenue. The zone of interests that Congress sought to protect through the FHA does not embrace municipalities seeking to recover for collateral losses rather than discrimination.

But the Eleventh Circuit held that language in *Trafficante* required it to interpret "aggrieved" differently in the FHA, and thus to hold Miami a proper plaintiff even though it is outside the zone of interests. The Eleventh Circuit never asserted that the different outcomes under Title VII and the FHA made any interpretive or doctrinal sense; to the contrary, the court itself acknowledged that *Trafficante*

County, Alabama. Most of these governments have brought multiple suits against different banks.

"appears to rest on reasons rejected in [more recent] decisions." Pet. App. 27a (citations omitted). Quite so: this Court held in *Thompson* that only a plaintiff within Title VII's "zone of interests" is "aggrieved," precisely because "absurd consequences" would result from giving a civil-rights lawsuit to *anyone* pleading an injury that could somehow be traced back to an act of discrimination. Yet the Eleventh Circuit thought this Court required that the FHA be read to require that very absurdity, because this Court has not expressly disavowed the reading of *Trafficante* and related cases to allow FHA suits by any plaintiff with an Article III injury-in-fact.

Only this Court can resolve the tension in its own opinions—between the long-ago statements in *Trafficante*, which the Eleventh Circuit thought were still binding, and the modern holdings of *Thompson* and *Lexmark*, which make clear that such an interpretation is not only wrong but absurd.

Reversing the district court, the Eleventh Circuit also adopted a definition of proximate cause that conflicts both with decisions of this Court and other courts of appeals. This Court has consistently recognized that in federal statutes, proximate cause means more than just a foreseeable injury; if the statutory violation does not actually cause the plaintiff's alleged injury, it at least must lead directly to that injury. *E.g.*, *Lexmark*, 134 S. Ct. at 1390. Other courts of appeals have applied this directness requirement in a host of federal statutes. *E.g.*, *Aransas Project v. Shaw*, 775 F.3d 641, 658 (5th Cir. 2014); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 278-79 (2d Cir. 2003). The Eleventh Circuit ignored this Court's decisions, and split with these other courts of

appeals, by dispensing with any directness test and holding instead that, no matter how remote the causal chain, proximate cause is satisfied as long as the defendant could, in some way, foresee that its conduct could lead to the alleged injury.

This Court has renewed plaintiffs' interest in FHA litigation with its recent decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015) (*Inclusive Communities*). But while sustaining the disparate-impact cause of action, this Court cautioned that "safeguards" are necessary to prevent its abuse. *Id.* at 2523. This case, and the host of copycat cases like it (including three counties' suit filed after the decision below), is a perfect example of how a civil-rights statute can be ill used by plaintiffs seeking a money recovery that Congress never meant to award them. This Court should intervene now—to resolve the tension in its own decisions; to resolve the conflict over proximate cause; and above all, to make clear that the FHA is not meant to prop up the municipal tax base, but "to provide . . . for fair housing throughout the United States." 42 U.S.C. § 3601.

STATEMENT

A. Plaintiffs Ordinarily Must Fall Within The Statutory "Zone Of Interests," Especially When A Statute Specifies That A Plaintiff Must Be An "Aggrieved Person"

Both the FHA and Title VII grant a cause of action to plaintiffs who are "aggrieved" by a violation of the

statute. 42 U.S.C. § 3613(a)(1)(A) (FHA);[2] 42 U.S.C. § 2000e-5(f)(1) (Title VII). When Congress creates a statutory cause of action, it presumptively limits the class of proper plaintiffs to some degree, rather than allowing anyone to sue if she can allege standing under Article III of the Constitution. In Title VII in particular, this Court has held, the term "aggrieved" serves that limiting function: it narrows the class of plaintiffs to those who seek to invoke the type of interest protected by the statute. The question in this case is whether the FHA, in contrast, imposes no such limit and allows anyone with Article III standing to sue.

The "common usage of the term 'person aggrieved'" does not encompass everyone who can claim injury in fact. *Thompson*, 562 U.S. at 177. Rather, a "person aggrieved" is someone within the statutory zone of interests, *id.*—someone who has suffered an injury to one of "the *sorts* of interests th[e] statutes were specifically designed to protect." *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 886 (1990). "[I]njury in fact" in the Article III sense "does not necessarily mean one is within the zone of interests to be protected by a given statute." *E.g.*, *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 524 (1991).

In *Thompson*, this Court expressly held that Title VII employs that "common usage" of "person aggrieved." Thus, a person with Article III standing may still not be able to sue under Title VII if his interest is "unrelated to the statutory prohibitions in

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[2] The FHA was originally adopted as Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 81. This Court's decisions sometimes refer to it as Title VIII.

Title VII." 562 U.S. at 178. There can be no Title VII suit by a person who was "collateral damage, so to speak, of the [defendant's] unlawful act." *Id.*

This Court's decision in *Lexmark* confirmed *Thompson*'s holding and applied it more broadly to "all statutorily created causes of action." 134 S. Ct. at 1388. *Lexmark* considered who may sue under the Lanham Act, which on its face authorizes suit by "any person who believes that he or she is or is likely to be damaged." 15 U.S.C. § 1125(a)(1). In construing that language, the Court applied the same generally applicable rule as in *Thompson*: "we presume that a statutory cause of action extends only to plaintiffs whose interests fall within the zone of interests protected by the law invoked." 134 S. Ct. at 1388 (quotation marks omitted). That limitation—which the Court made clear was the same APA "zone of interests" test it had applied to Title VII in *Thompson*—"*always* applies and is never negated." *Id.* (emphasis in original).

On the rare occasions where Congress wants to open the door more widely, and to permit anyone with Article III standing to sue, the statute itself "will show" that intent. *Id.* Thus, for example, the Endangered Species Act permits suit by "any person"—language "of remarkable breadth" compared to other statutory causes of action. *Bennett v. Spear*, 520 U.S. 154, 164-65 (1997).

To be faithful to *Thompson* and *Lexmark*, then, a court must first examine the zone of interests that Congress meant to protect in each statute. Then, it must only permit suits by persons within that zone.

B. This Court Previously Suggested That Both Title VII And The FHA Permit Any Plaintiff With Standing To Sue, But Has Disavowed That Dicta

In a trio of cases decided over thirty years ago, this Court suggested that the FHA and Title VII may impose no zone-of-interests limitation, but may instead permit suit by anyone with Article III standing. In *Thompson*, the Court disavowed that suggestion as dicta that was "too expansive" and, indeed, incorrect. The *Thompson* Court expressly held that Title VII *does* follow the ordinary pattern of giving a cause of action only to those within the zone of interests. 562 U.S. at 176-78. But as explained below, the Eleventh Circuit in this case nonetheless held that the older dicta bound it to still give the same language, when it appears in the FHA, the different and broader interpretation that *Thompson* expressly discredited.

1. What this Court actually held in those three cases is that plaintiffs who were not the "direct objects of discrimination" can still be "aggrieved" for purposes of the FHA. In particular, the Court recognized that discrimination against others can still harm an individual interest the FHA protects—the benefits of living in an integrated community. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209-10 (1972); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 111-14 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375-78 (1982). Those holdings simply are not implicated by Miami's suit, which is not based on allegations that the City experienced any discrimination or lost any of the benefits of integration.

In the first of the three older decisions, *Trafficante*, this Court made a broader statement, on which the court of appeals would ultimately rely in this case: that *anyone* with Article III standing is "aggrieved" under both the FHA and Title VII. 409 U.S. at 209. But as this Court later explained in *Thompson*, the *Trafficante* Court did not need to rely on such broad reasoning.

In *Trafficante*, two tenants of an apartment complex alleged that the complex's owner discriminated against nonwhites, and hence deprived the plaintiffs of the social and economic benefits of living in an integrated complex. *Id.* at 206-08. This Court held that they were "aggrieved." The Court cited a Third Circuit case interpreting Title VII, which had held that the word "aggrieved" showed "'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'" *Id.* at 209 (quoting *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971)). This Court wrote that with respect to FHA suits "we reach the same conclusion, *insofar as tenants of the same housing unit that is charged with discrimination are concerned.*" *Id.* (emphasis added). The Court again emphasized, later in the opinion, that it interpreted "aggrieved" to "give[] standing to sue to all *in the same housing unit* who are injured by racial discrimination in the management of those facilities." *Id.* at 212 (emphasis added).

2. In the two later cases, this Court repeated *Trafficante*'s statement that an "aggrieved" person for purposes of the FHA extends as broadly as Article III standing, without acknowledging *Trafficante*'s limitation to "tenants of the same housing unit that

is charged with discrimination." *Gladstone*, 441 U.S. at 96-97; *Havens*, 455 U.S. at 372. But the results in those cases were driven by *Trafficante*'s actual holding, not its dicta: *i.e.*, that a person can be "aggrieved" under the FHA if she is deprived of the benefits of an integrated community. *See Gladstone*, 441 U.S. at 111; *Havens*, 445 U.S. at 377-78. Neither case required the Court to interpret "aggrieved" to encompass anyone with Article III standing. Notably, in *Gladstone*, this Court expressly stated that it was not addressing the zone-of-interests issue (which, at that time, it called statutory or "non-constitutional standing"). 441 U.S. at 100 n.6.

3. In *Thompson*, this Court directly confronted the question whether the word "aggrieved" in Title VII really did "confer[] a right to sue on all who satisfied Article III standing." The Court unanimously concluded that it did not. 562 U.S. at 176-77. The Court acknowledged its "dicta" in *Trafficante*, repeated in other cases, that anyone who alleges Article III standing is "aggrieved" under Title VII. But it concluded that "this dictum was ill-considered" and "decline[d] to follow it." *Id.* at 176. The Court reasoned that interpreting the word "aggrieved" so broadly would lead to "absurd consequences": "For example, a shareholder would be able to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence." *Id.* at 176-77.

In reaching this interpretation of a person "aggrieved" in Title VII, the Court did not dismiss *Trafficante*, *Gladstone*, and *Havens* as irrelevant because they involved the FHA and not Title VII. Instead the

Court emphasized the crucial distinction between the holdings of those cases—that a plaintiff is "aggrieved" under the FHA if she has been deprived of the benefits of an integrated community—and those decisions' dicta suggesting that this necessarily meant that anyone claiming Article III standing is "aggrieved." For instance, the Court emphasized that that interpreting "aggrieved" to incorporate the "zone of interests" test is "fully consistent with our application of the term ['aggrieved'] in *Trafficante*," *id.* at 177, and that the holdings of all three FHA cases "are compatible with the 'zone of interests' limitation," *id.* at 176. The Court also suggested that the word "aggrieved" should have the same meaning in Title VII and the FHA, rejecting the defendant's argument for an interpretation of "aggrieved" even narrower than the "zone of interests" because the defendant's interpretation "contradict[ed] the very holding of *Trafficante*": "We see no reason why ['aggrieved'] should be given a narrower meaning" in Title VII than in the FHA. *Id.* at 177.

C. Miami Sues, Blaming Banks For Declining Property Values

Unlike the plaintiffs in this Court's earlier FHA cases, Miami invoked no interest in remedying segregation. In fact, the complaint did not even mention either segregation or integration. Rather, this complaint was all about money.

Miami alleged that Bank of America's lending practices set in motion a "causal chain" that ultimately cost Miami money. The complaint alleged that Bank of America made loans to minority borrowers on terms that were less advantageous than

terms on its loans to similarly-situated non-minority borrowers. Pet. App. 6a. It alleged that these less-favorable terms led some minority-owned property owners to unnecessarily or prematurely default; that some of those defaults led to foreclosures; that foreclosures led to decreased property values at both the foreclosed property and surrounding properties; and that this decrease in property value led to lower property tax revenue for Miami. Pet. App. 10a. Miami also contended that foreclosure led to blight and that blighted neighborhoods require more municipal services—police, firefighters, garbage collectors, etc. Miami demanded the cost of these additional services as well. *Id.*

The district court granted Bank of America's motion to dismiss. First, the court concluded that, based on *Thompson* and *Lexmark*, only someone who satisfied the "zone of interests" test described in *Thompson* and earlier cases could bring suit under the FHA, and that "[t]he City's complaints of decreased tax revenue and increased municipal services are 'so marginally related to ... the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit suit.'" Pet. App. 68a (quoting *Thompson*, 562 U.S. at 178) (alteration in original). Second, relying on *Lexmark*, the court concluded that Miami's alleged injuries were not proximately caused by Bank of America's alleged conduct because the alleged "causal chain is too attenuated." Pet. App. 69a.[3]

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[3] The district court also dismissed Miami's complaint on statute of limitations grounds. Pet. App. 71a-72a. The Eleventh Circuit remanded for Miami to file an amended complaint to at-

D. The Court Of Appeals Reinstates Miami's Complaint Based On This Court's Dictum in *Trafficante*

The Eleventh Circuit reversed the dismissal of Miami's complaint.[4] Pet. App. 1a-55a. The court of appeals held that the case must proceed even if Miami is outside the FHA's zone of interests and even if Miami cannot show that Bank of America directly caused it any injury.

1. First, with regard to the "zone of interests," the court of appeals held that it was "bound by Supreme Court precedent": as the court of appeals read the cases, this Court had already ruled out any limitation besides bedrock Article III standing. Pet. App. 19a. The court of appeals confessed that it found the status of this Court's precedent a "difficult issue," and that resolving that issue "ha[d] sharply divided the courts that have considered it." *Id.* at 26a-27a. But the court of appeals concluded that it was constrained to apply the dictum from *Trafficante*: until this Court expressly disavows the statement, the court of appeals stated, "the definition of an 'aggrieved person' under the FHA extends as broadly as permitted under Article III." *Id.* at 28a.

The court of appeals acknowledged that *Thompson* and *Lexmark* "have cast some doubt on the viability"

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tempt to cure the statute of limitations deficiency. *Id.* at 42a-43a. The statute of limitations is not at issue here.

[4] The Eleventh Circuit incorporated its opinion in this case into its decision in Miami's parallel suit against Wells Fargo. This petition is being filed concurrently with the petition in that case. Because the petitions present overlapping issues, both sets of petitioners believe both petitions should be granted. The Court may then wish to consolidate the cases for oral argument.

of that reading of *Trafficante* and the cases following it. The court agreed that "Title VII contains nearly identical statutory language to the FHA." Pet. App. 21a, 28a. And the court gave no reason why that identical language would have significantly different meanings in the two statutes. The court did not defend its limitless construction of "aggrieved person" *at all*, as a matter of text, purpose, or policy. Indeed, the court thought that *Thompson* "may signal that the Supreme Court is prepared to narrow its interpretation of the FHA in the future," especially given that "*Thompson* indicat[ed] that its Title VII interpretation is 'compatible' with the Court's previous FHA holdings." *Id.* at 28a.

Rather, for the court of appeals, the only salient consideration was that this Court has not expressly disavowed the language from *Trafficante* about FHA suits. Citing cases establishing that only this Court can overrule one of its decisions, the Eleventh Circuit held that the analysis began and ended with *Trafficante*'s statement that "aggrieved" in the FHA extended as broadly as Article III. The court concluded that because Miami had Article III standing, it was a proper plaintiff under the FHA. Pet. App. 29a-30a.

2. The court of appeals acknowledged that a claim under the FHA, like virtually all other tort-like statutory claims, requires the plaintiff to show that the defendant was the *proximate* cause of her injury. Merely showing that the injury is ultimately "traceable" to the defendant is not enough. Pet. App. 32a-33a. But the Eleventh Circuit held that a proximate cause need not be a direct one, and that the plaintiff need only show that its injury was a "foreseeable" one. *Id.* at 38a. And the court thought the alleged

injury would have been "foreseeable" to the Bank, despite there being "several links in th[e] causal chain," if the Bank had used some combination of "analytical tools" (such as regression analyses) and "published reports" to forecast the effect on Miami. *Id.* at 38a-39a.

The court recognized that this Court had required directness, not just foreseeability, as part of the proximate-cause inquiry for RICO, antitrust, and Lanham Act claims. Pet. App. 35a (citing *Holmes v. SIPC*, 503 U.S. 258 (1992), and *Lexmark*, 134 S. Ct. at 1390). But the court concluded that because this Court in *Trafficante* had allowed claims based on loss of the benefits of an integrated community—*i.e.*, claims with some discontinuity between the defendant's conduct and the plaintiff's injury—directness is irrelevant in the FHA. Pet. App. 36a-37a.

3. The Eleventh Circuit denied panel rehearing and rehearing *en banc*. Pet. App. 56a.

REASONS FOR GRANTING THE WRIT

Last Term, in *Inclusive Communities*, this Court cautioned that FHA disparate-impact claims must be appropriately cabined, lest the statute become seen as a panacea for any perceived effect of discrimination. The Eleventh Circuit heeded no such caution. With a single opinion, the Eleventh Circuit stripped out of the Fair Housing Act both of the key threshold limitations that keep the statutory cause of action focused on those who seek *fair housing*. Indeed, only a wholesale dismantling of those limitations could have permitted the City's attenuated theory to go forward. Both aspects of the Eleventh Circuit's decision require this Court's review so that, consistent

with *Inclusive Communities* as well as *Thompson* and *Lexmark*, the FHA is not diverted in its purpose and meaning.

First, the Eleventh Circuit zone-of-interests holding rested solely on a perceived conflict in this Court's decisions, one that only this Court can resolve. This Court has squarely, repeatedly, and recently held that the zone-of-interests requirement applies "to all statutorily created causes of action," and that "absurd consequences would follow" if an "aggrieved" person included anyone who could make out the minimum showing of Article III standing. Yet the Eleventh Circuit was able to disregard this Court's holdings by citing other, older decisions from this Court. At a minimum, as the Eleventh Circuit itself acknowledged, those older decisions "appear[] to rest on reasons rejected in [the more recent] line of decisions." Pet. App. 27a (citations omitted). It now falls to this Court to confirm that it meant what it said more recently: the interpretation of "aggrieved" that governs Title VII, and indeed "all statutorily created causes of action," governs the FHA as well.

Second, the Eleventh Circuit incorrectly disregarded this Court's holdings that every tort-like statute (including the FHA) presumptively embodies concepts of proximate cause, which means something more than hypothetical foreseeability. Multiple circuits have agreed. The court of appeals announced a different and conflicting rule here. By reading directness out of the FHA proximate-cause requirement, the Eleventh Circuit left that requirement toothless, and created significant uncertainty concerning how lower courts should approach proximate cause across federal statutes.

I. This Court Should Grant Certiorari To Resolve The Conflict Between *Thompson* and *Trafficante* Concerning The Meaning Of "Aggrieved" In The FHA

Both Title VII and the FHA create a cause of action for those "aggrieved" by a statutory violation. 42 U.S.C. § 3613(a)(1)(A) (FHA); 42 U.S.C. § 2000e-5(f)(1) (Title VII). This Court has held that "when Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (interpreting ADEA language based on prior interpretations of identical Title VII language). And, indeed, this Court suggested in both *Trafficante* and *Thompson* that the word "aggrieved" should have the same meaning in both statutes: when called upon in *Trafficante* to interpret the term "aggrieved" under the FHA, it relied on a Title VII case, and when called upon in *Thompson* to interpret the same term in Title VII, it looked in part to FHA cases.

Nevertheless, like other courts, the court of appeals here felt constrained to disregard the clear implication of *Thompson*—that the word "aggrieved" includes a zone-of-interest limitation in *both* Title VII *and* the FHA—and instead follow this Court's statements in *Trafficante*, *Havens*, and *Gladstone* that the word "aggrieved" in the FHA stretches as broadly as Article III allows. It did not suggest that conclusion makes sense, or that *Thompson*'s reasoning is inapplicable to the FHA; instead, it ignored *Thompson* solely because this Court has held that only it can "overrul[e] its own decisions," and hence that lower

courts should follow a case that has "direct application" even when that case "rest[s] on reasons rejected in some other line of decisions," *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

This Court should grant certiorari to end this confusion and explain that there is no 1970s-era FHA exception to *Thompson* and *Lexmark*. Because lower courts feel constrained to ignore *Thompson* in the FHA context, the very same "absurd" suits this Court sought to avoid under Title VII have found purchase, so far, under the FHA. And those suits are acceptable not because of some perceived difference in the statutes, but simply because this Court has not yet spoken in the FHA context. It should do so now.

A. This Court Settled The Meaning Of "Aggrieved" In *Thompson*

This Court has consistently understood that "aggrieved" means the same thing in the FHA and in Title VII. And that meaning is authoritatively set out in *Thompson*: only plaintiffs within the statutory zone of interest may sue.

First, in *Trafficante*, the Court interpreted the FHA by referring to cases interpreting Title VII. *See* 409 U.S. at 209. And in *Thompson*, this Court rejected one proposed interpretation of the word "aggrieved" in Title VII because that interpretation was inconsistent with the result of prior FHA cases. The Court wrote: "We see no reason why ['aggrieved'] in Title VII should be given a narrower meaning" than in the FHA. 562 U.S. at 177. In fact, there is "no reason" why the two statutes should diverge at all. They use essentially the same term, to define the

same thing: who can sue. Further, this Court went out of its way in *Thompson* to emphasize that the "zone of interests" interpretation of "aggrieved" is consistent with actual holdings of the older FHA cases—that plaintiffs alleging either direct discrimination or a loss of the benefits of an integrated community are "aggrieved." *Id.* at 176. Such explanation would be unnecessary if the words had different meanings in each statute.

Second, *Thompson*'s primary reasoning—that "absurd" consequences could follow from extending standing to the full reach of Article III—is equally applicable to the FHA. The "absurd consequence" this Court pointed to in *Thompson* was that "a shareholder would be able to sue a company for firing a valuable employee for racially discriminatory reasons, so long as he could show that the value of his stock decreased as a consequence." 562 U.S. at 176-77. Congress did not use the word "aggrieved" (rather than, say, "any person") to bar such absurdities in Title VII, but then use the same word to authorize those same absurdities in the FHA. In this factual context, for instance, there is no reason to think that Congress (on one hand) barred Miami from suing a company for lost property tax revenue after the company's employee lost her home as a result of an allegedly-discriminatory firing, but (on the other hand) meant to allow Miami's suit for lost property tax revenue in this case.

Third, to the extent *Thompson* left any doubt as to whether a plaintiff must be within the FHA's "zone of interests" to be "aggrieved," *Lexmark* resolved it. In *Lexmark*, this Court wrote that it has "made clear" that the zone-of-interests analysis "applies to

all statutorily created causes of action; that it is a requirement of general application; and that Congress is presumed to legislate against the background of the zone-of-interests limitation, which applies unless it is expressly negated." 134 S. Ct. at 1388 (internal quotation marks and alterations omitted). *Lexmark*'s statement that zone-of-interests analysis applies to all statutes, especially when combined with *Thompson*'s congruent reading of "aggrieved" in Title VII, makes clear that an FHA plaintiff is not "aggrieved" unless she is within the FHA's "zone of interests."

B. No Further Lower-Court Percolation Can Resolve The Meaning Of This Court's Own Decisions

The absence of a circuit conflict is no reason to deny certiorari here. As discussed above, the primary basis for the Eleventh Circuit's opinion was inertia: it recognized the tension between this Court's cases, but felt powerless to follow *Thompson*'s clear reasoning in the face of this Court's dicta in *Trafficante*. The court of appeals did not do any of the analytical work that can benefit this Court while an issue percolates—no interpretation, no harmonization, no weighing of competing considerations. The court of appeals thought this Court had done all that in 1972.

Decisions like this one mean an issue is not percolating, but stagnating. Even if every court of appeals wrote its own opinion following the Eleventh Circuit's opinion in this case, certiorari would be necessary—not to resolve a split in the courts of appeals, but to resolve the tension between this Court's decisions that results in cases being decided based on

obedience rather than reason. That tension will still exist, and need to be resolved by this Court, no matter how many additional appellate decisions consider this issue.

That point is amply demonstrated by the other lower-court decisions that reason as the court of appeals did here. No lower court has suggested that *Thompson*'s logic does not extend to the word "aggrieved" in the FHA. Indeed, petitioners know of no court that has held that there is some principled reason why the same word would mean something different in the FHA than what it means in Title VII.

The issue has recurred frequently since *Thompson*. As noted above, municipal plaintiffs have been aggressive in bringing claims that plainly lie outside the zone of interests. *E.g.*, *County of Cook v. HSBC N. Am. Holdings Inc.*, __ F. Supp. 3d __, 2015 WL 5768575, at *8 (N.D. Ill. Sept. 30, 2015); *County of Cook v. Wells Fargo & Co.*, 115 F. Supp. 3d 909, 917 (N.D. Ill. 2015); *City of Los Angeles v. JPMorgan Chase & Co.*, 2014 WL 6453808, at *6 (C.D. Cal. Nov. 14, 2014); *City of Los Angeles v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047, 1057 (C.D. Cal. 2014); *see also, e.g.*, *DT Apartment Group, LP v. CWCapital, LLC*, 2012 WL 6693192, at *15-*16 (N.D. Tex. Dec. 26, 2012). Nearly all of those claims have been allowed to proceed.

Throughout the flurry of FHA decisions holding that nothing more than Article III standing is required, no court has provided *any* reasoned explanation for *why* a person outside the statute's zone of interests could be "aggrieved" under the FHA, but not "aggrieved" under Title VII. Those courts acknowledge *Thompson*'s logic, but hold themselves

unable to follow that logic where it leads without running afoul of this Court's forty-year-old statements that plaintiffs are "aggrieved" for FHA purposes so long as they have Article III standing. *See, e.g.*, *County of Cook v. HSBC*, __ F. Supp. 3d __, 2015 WL 5768575, at *8; *City of Los Angeles v. Wells Fargo*, 22 F. Supp. 3d at 1057. Thus, they simply feel constrained by this Court's forty-year-old decision in *Trafficante* to apply a rule that no court believes is justifiable today. As the Eleventh Circuit put it, the only reason to allow FHA suits by plaintiffs that fail the zone-of-interests test is that "the Supreme Court has insisted on reserving to itself the task of burying its own decisions." Pet. App. 27a-28a.

Indeed, those decisions do not even recognize the substantiality of the issue. In one of the largest municipal lawsuits, for example, the district court held that the applicability of *Trafficante* is so clear that there is no "substantial ground for difference of opinion," as required for an interlocutory appeal. *City of Los Angeles v. Wells Fargo & Co.*, 2014 WL 3101450, at *2 (C.D. Cal. July 7, 2014).

2. So long as lower courts continue to disregard *Thompson* in FHA cases in a misplaced attempt to obey *Trafficante*, plaintiffs' lawyers will continue to bring under the FHA the same sort of suits beyond the zone of interests that this Court held "absurd" under Title VII. For instance, as the law currently stands, a city cannot sue to recover lost income taxes under Title VII based on an allegedly discriminatory firing, but the same city can sue under Title VIII to recover lost *property* taxes based on an allegedly discriminatory *foreclosure*.

Only this Court has the power to stop that trend. This Court should promptly grant certiorari to resolve that conflict and ensure that lower courts need no longer apply a rule that those courts themselves cannot justify. Granting certiorari would allow this Court not only to resolve the tension between *Thompson* and *Trafficante*, but preserve the statutory purpose of the FHA.

C. The Meaning Of "Aggrieved Person" Is Outcome Determinative Because Miami Is Not In The Fair Housing Act's "Zone Of Interests"

This case is a particularly good vehicle to decide whether an FHA plaintiff must be within the "zone of interests" because Miami is so plainly outside that zone. As *Thompson* explained, a plaintiff falls outside a statute's "zone of interests" if "the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." 562 U.S. at 178. The FHA was enacted to protect the housing market, and participants in it, from invidious discrimination in the sale and rental of homes. The statute does its job by protecting those who seek to obtain or retain housing and those who have an interest in the benefits of an integrated communities. A city's loss of property tax revenue, on its own, is completely unrelated to the FHA's important but targeted goals of preventing discrimination and fostering integration in the housing market.[5]

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[5] In *Gladstone*, this Court acknowledged that the Village of Bellwood lost property tax revenue from realtors' racial steering

Miami's interest is solely in recovering money for economic losses allegedly caused by foreclosures—and its claimed injury would be the same no matter what caused the foreclosures. Miami is in exactly the same position as *anyone* who experienced some economic ebb as a result of someone else's foreclosure, including neighbors whose property lost value, utility companies that lost ratepayers, and local grocery stores that lost customers. Allowing any such entity to bring suit under the FHA is exactly the "absurd consequence" that the "zone of interests" limitation prevents. *Thompson*, 562 U.S. at 176-77.

Miami and governmental plaintiffs like it thus fall well outside the FHA's "zone of interests"—as the district court held here. Pet. App. 68a. Because the zone-of-interests limitation is so clearly outcome-determinative here, this case presents an ideal vehicle to decide whether it applies to the FHA as it does to Title VII and other statutes.

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practices. 441 U.S. at 110-11. But Bellwood's primary concern was not lost tax revenue, but that racial steering threatened to "replac[e] what is presently an integrated neighborhood with a segregated one." *Id.* at 110. The Court only mentioned lost tax revenue as a potential secondary effect of racial segregation. *Gladstone* never suggested that Bellwood could bring suit based solely on its desire to recoup allegedly lost tax revenue, without any claim that defendants' conduct led to segregation. Indeed, the Court's reference to lost tax revenue was not important to its decision, which, in any event, the Court cautioned was made on the face of the pleadings and could be revisited once evidence was developed for trial. *Id.* at 115 & n.31.

II. This Court Should Resolve The Circuit Split Concerning Whether Proximate Cause Requires Directness Between Defendant's Alleged Conduct And Plaintiff's Injury

This Court has consistently emphasized that Congress creates federal causes of action against the background of common-law principles, such as proximate cause. And it has equally consistently emphasized that the proximate-cause standard against which Congress legislates includes a requirement that the defendant's alleged conduct directly cause the plaintiff's alleged injury. But while this Court and other courts of appeals have recognized that Congress intends directness, by default, to be part of the proximate-cause inquiry, the Eleventh Circuit held that the FHA requires *no* directness at all because the FHA's text and history do not explicitly require it. This Court should grant certiorari to resolve that split and correct the Eleventh Circuit's erroneous limitation on the proximate-cause requirement.

A. This Court And Other Courts Of Appeals Have Held That Directness Is Part Of The Proximate-Cause Inquiry For Federal Causes Of Action

For decades, this Court has interpreted the proximate-cause standard for federal causes of action to require some degree of directness between the plaintiff's injury and the defendant's wrongful act. Recently, in *Lexmark*, this Court made clear that these holdings were not statute-specific, and that directness is a standard feature of the federal proximate-

cause inquiry. 134 S. Ct. at 1390. Courts of appeals have considered directness as part of the proximate-cause inquiry across a wide array of federal statutes.

1. This Court has repeatedly held that federal causes of action require a direct connection between injury and wrongful act. In *Associated General Contractors of California, Inc. v. Carpenters*, 459 U.S. 519 (1983), this Court held that while the language of the Clayton Act "is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation," Congress adopted the Act against the backdrop of common law principles like "proximate cause," which includes, as one factor, "the directness or indirectness of the asserted injury." *Id.* at 529, 535-36, 540. In *Holmes*, this Court reached the same conclusion in the RICO context, holding that RICO incorporates "the many shapes [proximate cause] took at common law," including "a demand for some direct relation between the injury asserted and the injurious conduct alleged." 503 U.S. at 268.

Lexmark made clear that a direct connection between the alleged injury and the statutory violation applies to federal causes of action "generally." 134 S. Ct. at 1390. This Court wrote that "the proximate-cause requirement generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct. That is ordinarily the case if the harm is purely derivative of 'misfortunes visited upon a third person by the defendant's acts.'" *Id.* (quoting *Holmes*, 503 U.S. at 268-69). *Lexmark* acknowledged that directness could, in some statutes, be satisfied even if there is an intermediary step between injury and harm—for instance, in a Lanham Act suit,

where a competitor was driven out of business by a defendant's misrepresentation to consumers. *Id.* at 1391. But even so, the directness requirement still bars suits where the alleged connection was too remote—for instance, a Lanham Act suit brought by an out-of-business competitor's "landlord, its electric company, and other commercial parties who suffer merely as a result of the competitor's inability to meet its financial obligations." *Id.* (internal quotation marks and alterations omitted).

These decisions—considering directness as part of the common-law proximate-cause inquiry Congress presumptively incorporates into federal causes of action—logically apply to any statute that incorporates background common-law tort principles. And this Court has already held that the FHA is such a statute: like the RICO, antitrust and Lanham Act statutes, the FHA incorporates "a legal background of ordinary tort-related ... rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003).

2. Unsurprisingly given the clarity of this Court's decisions, other courts of appeals have applied the directness requirement as part of the proximate-cause inquiry in a wide range of federal causes of action. The Second Circuit held pre-*Lexmark* that proximate cause precluded Americans with Disabilities Act suits where defendant's conduct is "too remotely or insignificantly related to the harm to be a legal basis for liability." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 278-79 (2d Cir. 2003) (internal quotation marks omitted). The Fifth Circuit reversed an injunction under the Endangered Species Act because the "concepts of direct relationship and foreseeability" are both part of the common-law proxi-

mate-cause requirement included in federal statutes, and the district court failed to consider the "remoteness [or] attenuation" of the causal chain alleged. *Aransas Project v. Shaw*, 775 F.3d 641, 658 (5th Cir. 2014). And the Ninth Circuit held that Copyright Act proximate cause requires that the alleged harm not be "too remote from the defendant's unlawful conduct." *Ray Charles Foundation v. Robinson*, 795 F.3d 1109, 1124 (9th Cir. 2015) (internal quotation marks omitted). Each of these cases recognized that federal causes of action by default require *some* degree of directness between the statutory violation and the alleged injury.

B. This Court Should Grant Certiorari To Resolve The Split The Eleventh Circuit Created By Holding That Directness Is Generally Not Part Of Proximate Cause

Despite the clarity of this Court's and other courts of appeals' decisions, the Eleventh Circuit held that the only factor relevant to proximate cause under the FHA is foreseeability. Pet. App. 38a. Instead of following other courts of appeals and considering directness as part of the background proximate-cause requirement against which Congress legislates, the Eleventh Circuit held that directness is irrelevant in the FHA because nothing in the "text or legislative history of the FHA" explicitly *required* directness. *Id.* at 37a. This Court should grant certiorari to resolve the split, especially given that the Eleventh Circuit's refusal to consider directness was likely outcome-determinative here.

1. The Eleventh Circuit's holding that foreseeability alone is enough to satisfy proximate cause here

creates a split with the Second, Fifth, and Ninth Circuits regarding the role of "directness" in the federal proximate-cause inquiry. As discussed above, each of those courts concluded that analyzing proximate cause *requires* analyzing the directness of the causal chain because directness is part of the proximate-cause background against which Congress legislates. The Eleventh Circuit held that directness is *irrelevant* because nothing in the text or history of the FHA specifically pointed to a directness requirement. The fact that these cases interpreted different statutes does not minimize the importance of the split because the underlying legal question—whether *some* degree of directness between statutory violation and injury is generally required—is the same across federal statutes.

2. This Court should grant certiorari to resolve the split concerning whether directness is a part of the proximate-cause requirement for federal causes of action. Before the Eleventh Circuit's decision, lower courts could be confident that, when interpreting federal causes of action, they should consider the directness between the alleged statutory violation and injury as part of the proximate-cause analysis. But after the Eleventh Circuit's decision, a district court considering the federal proximate-cause requirement has little way to know whether to consider directness. While the Fifth Circuit in *Aransas* reversed a district court for *failing to consider* directness because directness is presumptively part of the proximate-cause requirement even where the statute (the Endangered Species Act) said nothing about it, the Eleventh Circuit here reversed the district court for *considering* directness, reasoning that nothing in the FHA explicitly requires it. These analytical ap-

proaches are irreconcilable: one presumes a directness inquiry unless negated, while the other presupposes that there should be no directness inquiry. This Court should grant certiorari to resolve that conflict, which will arise in innumerable federal causes of action.

3. This case is a good vehicle to resolve the question whether directness is part of the federal proximate-cause inquiry because it is outcome-determinative. *Lexmark* made clear that even if a statute allows for *some* attenuation, that does not mean that it allows for *infinite* attenuation. And for Miami's suit to proceed, the FHA must allow for causal chains that are effectively infinite, allowing anyone to bring suit as long as they can plausibly trace some financial loss to an FHA violation committed against anyone else. If the FHA requires any degree of directness, Miami's suit cannot go forward.

C. The Eleventh Circuit's Limitation On FHA Proximate Cause Was Incorrect

The Eleventh Circuit's holding that directness is irrelevant to proximate cause for an FHA cause of action not only splits with other courts of appeals, it is plainly incorrect under *Lexmark*. Neither of the Eleventh Circuit's two attempts to distinguish *Lexmark* is valid.

As discussed above, *Lexmark* made clear that the directness between the wrongful act and the injury is crucial to the proximate-cause test. *E.g.*, 134 S. Ct. at 1390 (proximate-cause requirement "generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct."). And the Court's application of Lanham Act proximate cause further

emphasized this point. Although the Court acknowledged that defendant's conduct can proximately cause Lanham Act injury even where there is some attenuation between the conduct and the injury, there still is a limit to how much attenuation is permissible: an out-of-business competitor can sue, but its landlord and electric company cannot. *Id.* at 1391. Directness *always* plays some role in the proximate-cause analysis.

The Eleventh Circuit's decision to ignore directness in the FHA proximate-cause inquiry was based on two arguments, both of which are incorrect. First, the Eleventh Circuit relied on *Lexmark* for the proposition that proximate cause "can differ statute by statute," and because this Court authorized claims based on "indirect injuries" in cases like *Gladstone*, proximate cause in the FHA must not require directness. Pet. App. 35a-36a. But while *Lexmark* did recognize that the level of permissible attenuation might differ across statutes, it did not suggest that directness could play no role whatsoever. Even while holding that the Lanham Act would allow a bankrupt plaintiff to sue a competitor for misleading the public, *Lexmark* emphasized that the chain of causation extended no further. 134 S. Ct. at 1391. Similarly, while this Court's holdings allowing an FHA claim for deprivation of the benefits of an integrated community may imply that FHA proximate cause could be satisfied even where there is *some* attenuation, that does not mean that directness plays no role at all.

Second, the Eleventh Circuit argued that this Court's RICO and antitrust directness holdings were based on the "statutory text" and "legislative history"

of those statutes. But *Associated General Contractors* and *Holmes* were decided in spite, not because, of the statutory language, which this Court concluded literally covered all injuries no matter how "indirect." *Associated General Contractors*, 459 U.S. at 529; *see also Holmes*, 503 U.S. at 266 (statutory language could be read to require only "but for" causation); *Lexmark*, 134 S. Ct. at 1388 ("[r]ead literally" the Lanham Act "might suggest that an action is available to anyone who can satisfy ... Article III"). Instead, this Court concluded that proximate cause, including a directness requirement, was a background principle against which Congress is presumed to legislate. *E.g.*, *Holmes*, 503 U.S. at 267-68. Background tort principles, like directness, apply equally to the FHA. *See Meyer*, 537 U.S. at 285.

III. This Court Should Settle These Important Threshold Questions

This case presents two threshold questions about the scope of the FHA—questions that this Court should settle at the earliest opportunity, as a wave of new FHA litigation is underway. This Court's decision last Term in *Inclusive Communities* resolved the legal cloud that had been hovering over disparate-impact liability since at least 2005, while emphasizing the importance of "safeguards" that will keep disparate-impact litigation from running amok. But the broad license the Eleventh Circuit has given to FHA claims provides ample encouragement for new litigation, without adequate safeguards to ensure a proper plaintiff and a proper legal theory of injury. It is therefore essential that this Court mark out this boundary of the FHA cause of action now.

Recent developments within the Eleventh Circuit confirm that the current incentive structure lacks the necessary "safeguards." In November, shortly after the Eleventh Circuit denied rehearing, three of the largest counties in Georgia (including the one embracing Atlanta) filed a new FHA suit against petitioners and others. *Cobb County v. Bank of America Corp.*, No. 15-cv-4081 (N.D. Ga. filed Nov. 20, 2015). The new litigation follows the same model: brought by outside counsel seeking contingency fees; relying on statistical inferences of disparate impact; and demanding "hundreds of millions of dollars" in "compensatory damages alone," plus unspecified punitive damages. And this case demanding a nine-figure sum is just *one* of the many cases now being pursued by municipal plaintiffs. In each one, the Eleventh Circuit's reasoning would preclude a threshold dismissal and force the parties to litigate questions of injury-in-fact and causation through extensive discovery and expert statistical evidence—when in fact the entire litigation should never have proceeded past the pleading stage.

This Court noted in *Inclusive Communities* that some of the "Nation's largest cities—entities that are potential defendants in disparate-impact suits—ha[d] submitted an *amicus* brief . . . supporting disparate-impact liability." Those same cities are now benefiting from the FHA as *plaintiffs*: among the *amici* were the City of Miami and a number of other cities that have brought disparate-impact suits just like this one. *See* Br. for San Francisco et al., No. 13-1371. And those suits rely on the permissive theories of standing and causation that the Eleventh Circuit employed here—theories that use the FHA to

litigate purported injuries far afield from housing discrimination.

In short, this Court's recent *Inclusive Communities* decision, when paired with *Trafficante*, *Havens*, and *Gladstone*, has made civil FHA litigation a growth industry, especially for government plaintiffs that can claim nine-figure injuries. But as the Court itself cautioned, when recognizing disparate-impact liability it was "also necessary to protect potential defendants against abusive disparate-impact claims." 135 S. Ct. at 2524. This Court accordingly recognized certain "safeguards" that permit "prompt resolution" of a disparate-impact case, including "at the pleading stage." *Id.* at 2523. The pleading stage, correctly understood, includes the further "safeguards" of ensuring that there is a proper plaintiff and a cognizable claim of injury. But those safeguards will continue to be ignored by lower courts, thinking they are just following precedent, unless this Court now clarifies that those safeguards exist for the FHA as for other statutes.

This Court should grant certiorari to ensure that the FHA does not become a blank check for plaintiffs claiming nothing but economic losses only tenuously related to housing discrimination.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAVID J. ZIMMER
GOODWIN PROCTER LLP
Three Embarcadero Ctr.
24th Floor
San Francisco, CA 94111

March 4, 2016

WILLIAM M. JAY
Counsel of Record
THOMAS M. HEFFERON
MATTHEW S. SHELDON
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
wjay@goodwinprocter.com
(202) 346-4000

Counsel for Petitioners

APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-14543

D.C. Docket No. 1:13-cv-24506-WPD

CITY OF MIAMI,
a Florida Municipal Corporation,

Plaintiff - Appellant,

versus

BANK OF AMERICA CORPORATION,
BANK OF AMERICA, N.A., et al.,

Defendants - Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(September 1, 2015)

Before MARCUS and WILSON, Circuit Judges, and SCHLESINGER,* District Judge.

MARCUS, Circuit Judge:

The City of Miami has brought an ambitious fair housing lawsuit against Bank of America,[1] alleging that it engaged in a decade-long pattern of discriminatory lending in the residential housing market that caused the City economic harm. The City claims that the bank targeted black and Latino customers in Miami for predatory loans that carried more risk, steeper fees, and higher costs than those offered to identically situated white customers, and created internal incentive structures that encouraged employees to provide these types of loans. The predatory loans, as identified by the City, include: high-cost loans (i.e., those with an interest rate at least three percentage points above a federally established benchmark), subprime loans, interest-only loans, balloon payment loans, loans with prepayment penalties, negative amortization

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* Honorable Harvey E. Schlesinger, United States District Judge for the Middle District of Florida, sitting by designation.

[1] The City also filed substantially similar complaints against Citigroup and Wells Fargo for the same behavior. The three cases were heard by the same judge in the Southern District of Florida, and resolved in the same way: the reasoning laid out in the district court's order in this case was adopted and incorporated in the orders dismissing the other two cases. They were each appealed separately. We have resolved the companion cases in separate opinions. See City of Miami v. Citigroup Inc., No. 14-14706; City of Miami v. Wells Fargo & Co., No. 14-14544. This opinion contains the most detailed account of our reasoning.

loans, no documentation loans, and adjustable rate mortgages with teaser rates (i.e., a lifetime maximum rate greater than the initial rate plus 6%). Complaint for Violations of the Federal Fair Housing Act at 34, City of Miami v. Bank of America Corp., No. 13-24506-CIV (S.D. Fla. July 9, 2014) ("Complaint"). The City alleged that by steering minorities toward these predatory loans, Bank of America caused minority-owned properties throughout Miami to fall into unnecessary or premature foreclosure, depriving the City of tax revenue and forcing it to spend more on municipal services (such as police, firefighters, trash and debris removal, etc.) to combat the resulting blight. The City asserts one claim arising under the Fair Housing Act (FHA), 42 U.S.C. § 3601 et seq., as well as an attendant unjust enrichment claim under Florida law.

The district court dismissed the City's FHA claim with prejudice on three grounds: the City lacked statutory standing under the FHA because it fell outside the statute's "zone of interests"; the City had not adequately pled that Bank of America's conduct proximately caused the harm sustained by the City; and, finally, the City had run afoul of the statute of limitations and could not employ the continuing violation doctrine. We disagree with each of these conclusions.

As a preliminary matter, we find that the City has constitutional standing to pursue its FHA claims. We also conclude that under controlling Supreme Court precedent, the "zone of interests" for the Fair Housing Act extends as broadly as permitted under

Article III of the Constitution, and therefore encompasses the City's claim. While we agree with the district court that the FHA contains a proximate cause requirement, we find that this analysis is based on principles drawn from the law of tort, and that the City has adequately alleged proximate cause. Finally, we conclude that the "continuing violation doctrine" can apply to the City's claims, if they are adequately pled.

Because the district court imposed too stringent a zone of interests test and wrongly applied the proximate cause analysis, we conclude that it erred in dismissing the City's federal claims with prejudice and in denying the City's motion for leave to amend on the grounds of futility. As for the state law claim, we affirm the dismissal because the benefits the City allegedly conferred on the defendants were not sufficiently direct to plead an unjust enrichment claim under Florida law.

I.

On December 13, 2013, the City of Miami brought this complex civil rights action in the United States District Court for the Southern District of Florida against Bank of America Corporation, Bank of America N.A., Countrywide Financial Corporation, Countrywide Home Loans, and Countrywide Bank, FSB (collectively "Bank of America" or "the Bank") containing two claims. First, it alleged that the defendants violated sections 3604(b)[2] and 3605(a)[3] of

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[2] 42 U.S.C. § 3604(b) makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale

the Fair Housing Act, Complaint at 53, by engaging in discriminatory mortgage lending practices that resulted in a disproportionate and excessive number of defaults by minority homebuyers and caused financial harm to the City. It also alleged that the Bank unjustly enriched itself by taking advantage of "benefits conferred by the City" while, at the same time, engaging in unlawful lending practices, which "denied the City revenues it had properly expected through property and other tax payments and . . . cost[] the City additional monies for services it would not have had to provide . . . absent [the Bank's] unlawful activities."

The complaint accused Bank of America of engaging in both "redlining" and "reverse redlining." Redlining is the practice of refusing to extend mortgage credit to minority borrowers on equal terms as to non-minority borrowers. Reverse redlining is the practice of extending mortgage credit on exploitative terms to minority borrowers. Complaint at 3. The City alleged that the Bank

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or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin."

[3] "It shall be unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin." 42 U.S.C. § 3605(a). A "residential real estate-related transaction" includes "the making or purchasing of loans . . . for improving, constructing, repairing, or maintaining a dwelling; or secured by residential real estate." Id. § 3605(b)(1).

engaged in a vicious cycle: first it "refused to extend credit to minority borrowers when compared to white borrowers," then "when the bank did extend credit, it did so on predatory terms." Id. at 4. When minority borrowers then attempted to refinance their predatory loans, they "discover[ed] that [the Bank] refused to extend credit at all, or on terms equal to those offered . . . to white borrowers." Id. at 5.

The City claimed that this pattern of providing more onerous loans -- i.e., those containing more risk, carrying steeper fees, and having higher costs -- to black and Latino borrowers (as compared to white borrowers of identical creditworthiness) manifested itself in the Bank's retail lending pricing, its wholesale lending broker fees, and its wholesale lending product placement. Id. at 18-25. It also averred that the Bank's internal loan officer compensation system encouraged its employees to give out these types of loans even when they were not justified by the borrower's creditworthiness. See id. at 20, 24. The City claimed that Bank of America's practice of redlining and reverse redlining constituted a "continuing and unbroken pattern" that persists to this day. Id. at 4.

The City said that the Bank's conduct violated the Fair Housing Act in two ways. First, the City alleged that the Bank intentionally discriminated against minority borrowers by targeting them for loans with burdensome terms. Id. at 30-33. Second, the City claimed that the Bank's conduct had a disparate impact on minority borrowers, resulting in a disproportionate number of foreclosures on minority-owned properties, and a disproportionate number of

exploitative loans in minority neighborhoods. Id. at 26-30.

Among other things, the City employed statistical analyses to draw the alleged link between the race of the borrowers, the terms of the loans, and the subsequent foreclosure rate of the underlying properties. Drawing on data reported by the Bank about loans originating in Miami from 2004-2012, the City claimed that a Bank of America loan in a predominantly (greater than 90%) minority neighborhood of Miami was 5.857 times more likely to result in foreclosure than such a loan in a majority-white neighborhood. Id. at 43. According to the City's regression analysis (which purported to control for objective risk characteristics such as credit history, loan-to-value ratio, and loan-to-income ratio), id. at 37, a black Bank of America borrower in Miami was 1.581 times more likely to receive a loan with "predatory" features[4] than a white borrower, and a Latino borrower was 2.087 times more likely to receive such a loan. Moreover, black Bank of America borrowers with FICO scores over 660 (indicating good credit) in Miami were 1.533 times more likely to receive a predatory loan than white borrowers, while

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[4] As we've noted, the City identified as "predatory" those containing features such as high-cost loans (i.e., those with an interest rate that was at least three percentage points above a federally established benchmark), subprime loans, interest-only loans, balloon loan payments, loans with prepayment penalties, negative amortization loans, no documentation loans, and adjustable rate mortgages with teaser rates (i.e., a lifetime maximum rate greater than the initial rate plus 6%). Complaint at 34.

a Latino borrower was 2.137 times more likely to receive such a loan. Id. at 6.

The City's data also suggested that from 2004-2012, 21.9% of loans made by Bank of America to black and Latino customers in Miami were high-cost, compared to just 8.9% of loans made to white customers. Id. at 34. Data cited in the complaint showed significantly elevated rates of foreclosure for loans in minority neighborhoods. While 53.3% of Bank of America's Miami loan originations were in "census tracts" that are at least 75% black or Latino, 95.7% of loan originations that had entered foreclosure by June 2013 were from such census tracks. Id. at 39. And 32.8% of Bank of America's loans in predominantly black or Latino neighborhoods resulted in foreclosure, compared to only 7.7% of its loans in non-minority (at least 50% white) neighborhoods. Id. at 40. Likewise, a Bank of America borrower in a predominantly black or Latino census tract was 1.585 times more likely to receive a predatory loan as a borrower with similar characteristics in a non-minority neighborhood. Id. at 38.

The complaint also alleged that the bank's loans to minorities resulted in especially quick foreclosures.[5]

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[5] The complaint quoted a joint report from the Department of Housing and Urban Development and the Department of the Treasury noting that time to foreclosure is an important indicator of predatory practices: "[t]he speed with which the subprime loans in these communities have gone to foreclosure suggests that some lenders may be making mortgage loans to borrowers who did not have the ability to repay those loans at the time of origination." U.S. Dep't of Hous. & Urban Dev. &

The average time to foreclosure for Bank of America's black and Latino borrowers was 3.144 years and 3.090 years, respectively, while for white borrowers it was 3.448 years. Id. at 42. The allegations also gathered data from various non-Miami-based studies (some nationwide, some based on case studies in other cities) to demonstrate the elevated prevalence of foreclosure, predatory loan practices, and higher interest rates among black and Latino borrowers, and the foreseeability of foreclosures arising from predatory lending practices and their attendant harm. See id. at 26-30.

The City's charges were further amplified by the statements of several confidential witnesses who claimed that the Bank deliberately targeted black and Latino borrowers for predatory loans. Thus, for example, one mortgage loan officer with Bank of America who worked on loans in the Miami area claimed that the bank targeted less savvy minorities for negative amortization loans. Id. at 31. Another noted that Bank of America paid higher commissions to loan officers for Fair Housing Act loans as opposed to the allegedly more advantageous Community Reinvestment Act (CRA) loans, incentivizing officers to steer borrowers away from the CRA loans. Id. at 32. Still another noted that back-end premiums (a premium earned by the loan officer equal to the difference between the borrower's loan rate and the rate the bank pays for it) on loans were not disclosed

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U.S. Dep't of Treasury, Curbing Predatory Home Mortgage Lending 25 (2000), available at http://www.huduser.org/Publications/pdf/treasrpt.pdf.
Complaint at 43.

and "often eluded less educated, minority borrowers." Id. One of the witnesses explained that from 2011-2013, Bank of America did not offer regular refinancing to persons with mortgages at over 80% of the value of the house (including many negative amortization loans), which disproportionately affected minorities in danger of losing their homes. Id. at 33.

Notably, the City sought damages based on reduced property tax revenues. Id. at 45. It claimed that the Bank's lending policies caused minority-owned property to fall into unnecessary or premature foreclosure. Id. The foreclosed-upon properties lost substantial value and, in turn, decreased the value of the surrounding properties, thereby depriving the City of property tax revenue. The City alleged that "Hedonic regression" techniques could be used to quantify the losses the City suffered that were attributable to the Bank's conduct. Id. at 46-47. The City also sought damages based on the cost of the increased municipal services it provided to deal with the problems attending the foreclosed and often vacant properties -- including police, firefighters, building inspectors, debris collectors, and others. These increased services, the City claimed, would not have been necessary if the properties had not been foreclosed upon due to the Bank's discriminatory lending practices. Id. at 49-50. The City also sought a declaratory judgment that the Bank's conduct violated the FHA, an injunction barring the Bank from engaging in similar conduct, and punitive damages, as well as attorneys' fees. Id at 55-56.

On July 9, 2014, the district court granted defendants' motion to dismiss.[6] First, the court found that the City of Miami lacked statutory standing to sue under the FHA. The court determined that, based on this Court's earlier opinion in Nasser v. City of Homewood, 671 F.2d 432 (11th Cir. 1982), the City's claim fell outside the FHA's "zone of interests," and therefore the City lacked standing to sue under this statute. In particular, the trial court determined that the City had alleged "merely economic injuries" that were not "affected by a racial interest." Like the plaintiffs in Nasser, the court suggested, the City was seeking redress under the FHA for "an economic loss from a decrease in property values," and as with the plaintiffs in Nasser, this was insufficient. The City's goal went far beyond the purpose of the FHA, which is to "provide, within constitutional limitations, for fair housing throughout the United States." City of Miami v. Bank of America Corp., 2014 WL 3362348, at *4 (quoting 42 U.S.C. § 3601).

The court also concluded that the FHA contains a proximate cause requirement, but that the City had not adequately pled proximate cause. The City had not sufficiently traced any foreclosures to the defendants' conduct, as opposed to confounding background variables such as "a historic drop in home prices and a global recession," and "the decisions and actions of third parties, such as loan services, government entities, competing sellers, and uninterested buyers." Id. at *5. The court also determined that the City had not shown that the

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[6] This order was adopted and incorporated in the two companion cases involving Citigroup and Wells Fargo.

Bank's mortgage practices caused the City any harm. It was unimpressed with the "statistics and studies" the City cited, noting that some were not based on data from Miami, some were not limited to the defendants' practices, and others "d[id] not control for relevant credit factors that undoubtedly affect lending practices." Id. Moreover, some of the harm to the City stemmed directly from "the actions of intervening actors such as squatters, vandals or criminals that damaged foreclosed properties." Id.

The district court also concluded that the City's federal claim ran afoul of the statute of limitations. It noted that for the FHA, a plaintiff must bring his claim "not later than 2 years after the occurrence" of the discriminatory housing practice, and that for discriminatory loans the statute of limitations begins to run from the date of the loan closing. But the City had not alleged that any loans were made later than 2008, a full five years before its complaint was filed. The court was not persuaded by the City's invocation of the continuing violation doctrine -- which can allow plaintiffs, under some circumstances, to sue on an otherwise time-barred claim -- since the City had not alleged sufficient facts to support its allegation that the specific practices continued into the statutory period. The district court dismissed the City's FHA claim with prejudice, reasoning that even if the statute of limitations deficiencies could be cured by an amended pleading, the City's lack of statutory standing could not be.

Finally, the district court rejected the City's unjust enrichment claim on several grounds. As a preliminary matter, the City had failed to draw the

necessary causal connection between the Bank's alleged discriminatory practices and its receipt of undeserved municipal services. Moreover, the court found that the City had failed to allege basic elements of an unjust enrichment claim under Florida law. It determined that any benefit the Bank received from municipal services was not direct but "derivative" and, therefore, insufficient to support an unjust enrichment claim. It also found that the City had failed to allege that the Bank was not otherwise entitled to those services as a Miami property owner. Finally, it rejected the City's argument that Miami was forced to pay for the Bank's externalities (the costs of the harm caused by its mortgage lending), holding that paying for externalities cannot sustain an unjust enrichment claim. The district court dismissed the unjust enrichment claim without prejudice, leaving the City free to amend its complaint.

The City chose not to proceed on its unjust enrichment claim alone "because the two claims are so intimately entwined and based on largely the same underlying misconduct." Instead, it moved in the district court for reconsideration and for leave to file an amended complaint, arguing that it had standing under the FHA and that the amended complaint would cure any statute of limitations deficiency. The proposed amended complaint alleged that the Bank's discriminatory lending practices "frustrate[] the City's longstanding and active interest in promoting fair housing and securing the benefits of an integrated community," thereby "directly interfering]" with one of the City's missions. First Amended Complaint for Violations of the

Federal Fair Housing Act at 31, City of Miami v. Bank of America Corp., No. 13-24506-CIV (S.D. Fla. Sept. 9, 2014) ("Amended Complaint"). It also made more detailed allegations about properties that had been foreclosed upon after being subject to discriminatory loans. Specifically, the proposed amended complaint identified five foreclosed properties that corresponded to predatory loans that originated between 2008 and 2012, and three that originated between 2004 and 2008. It also identified seven properties that corresponded to predatory loans that the Bank had issued after December 13, 2011 (within two years of filing suit) that had not yet been foreclosed upon but were likely to "eventually enter the foreclosure process," based on expert analysis. Id. at 36-37. The complaint continued to invoke the continuing violation doctrine and claimed that the statute of limitations had not run.

The district court denied the City's motion for reconsideration and for leave to amend. As for statutory standing, the court explained that "[a]rguing that this Court's reasoning was flawed is not enough for a motion for reconsideration." City of Miami v. Bank of America Corp., 2014 WL 4441368, at *2. And the court was unimpressed by the City's new argument that it "has a generalized non-economic interest . . . in racial diversity," ruling that these were "claims [the City] never made and amendments it did not previously raise or offer despite ample opportunity," and were therefore "improperly raised as grounds for reconsideration." Id. Finally, the court noted that these "generalized allegations [do not] appear to be connected in any meaningful way to the purported loss of tax revenue

and increase in municipal expenses allegedly caused by Defendants' lending practices." Id. at *2 n.1.

The City timely appealed the court's final order of dismissal.

II.

A. Standard of Review

We review the district court's grant of a motion to dismiss with prejudice de novo, "accepting the [factual] allegations in the complaint as true and construing them in the light most favorable to the plaintiff." Mills v. Foremost Ins. Co., 511 F.3d 1300, 1303 (11th Cir. 2008) (quotation omitted). We generally review the district court's decision to deny leave to amend for an abuse of discretion, but we will review de novo an order denying leave to amend on the grounds of futility, because it is a conclusion of law that an amended complaint would necessarily fail. Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla., 641 F.3d 1259, 1264 (11th Cir. 2011). Finally, we review de novo whether plaintiffs have Article III standing. Ga. Latino Alliance for Human Rights v. Governor of Ga., 691 F.3d 1250, 1257 (11th Cir. 2012).

B. Fair Housing Act Claim

1. Article III Standing

We come then to the first essential question in the case: whether the City of Miami has constitutional standing to bring its Fair Housing Act claim. See Bochese v. Town of Ponce Inlet, 405 F.3d 964, 974

(11th Cir. 2005) ("[Article III] [s]tanding is a threshold jurisdictional question which must be addressed prior to . . . the merits of a party's claims." (quoting Dillard v. Baldwin Cnty. Comm'rs, 225 F.3d 1271, 1275 (11th Cir. 2000)). Although the district court addressed only the issue of so-called "statutory standing," the Bank contests both Article III standing and statutory standing, and we address each in turn.

"[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992). It is by now axiomatic that to establish constitutional standing at the pleading stage, the plaintiff must plausibly allege: (1) an injury in fact that is concrete, particularized, and actual or imminent; (2) "a causal connection between the injury and the conduct complained of," such that the injury is "fairly traceable to the challenged action of the defendant"; and (3) that a favorable judicial decision will "likely" redress the injury. See Bochese, 405 F.3d at 980 (quotation omitted). The "line of causation" between the alleged conduct and the injury must not be "too attenuated." Allen v. Wright, 468 U.S. 737, 752 (1984). The party invoking federal jurisdiction bears the burden of establishing these elements. See FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990). At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice" to demonstrate standing. Defs. of Wildlife, 504 U.S. at 561.

The district court did not address whether the City had Article III standing because it granted the

Bank's motion to dismiss on other grounds. On appeal, the Bank argues that the City lacked Article III standing because it had not adequately alleged the causal connection -- that is, the "traceability" -- between its injury and the Bank's conduct. We are unpersuaded.

To recap, the City claims that the Bank's discriminatory lending practices caused minority-owned properties to fall into foreclosure when they otherwise would not have, or earlier than they otherwise would have. This, in turn, decreased the value of the foreclosed properties themselves and the neighboring properties, thereby depriving the City of property tax revenue, and created blight, thereby forcing the City to spend additional money on municipal services. Complaint at 45-50. We have little difficulty in finding, based on controlling Supreme Court caselaw, that the City has said enough to allege an injury in fact for constitutional standing purposes. Our analysis is guided by Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979). In that case, the Village of Bellwood sued a real estate firm under the FHA for discriminatory renting practices that caused racial segregation. Id. at 94-95. The Supreme Court held that the village had Article III standing to bring its claim partly on the basis of "[a] significant reduction in property values," because such a reduction "directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the costs of local government and to provide services." Id. at 110-11. Like the Village of Bellwood, the City of Miami claims that an allegedly discriminatory policy has reduced local property values and diminished its tax

base. Thus, like the Village of Bellwood, the City of Miami has adequately alleged an injury in fact.

As for Article III causation, the Bank claims that the City's harm is not fairly traceable to the Bank's conduct. Specifically, it suggests that a myriad of other factors cause foreclosure and blight -- including the state of the housing market and the actions of third parties like other property owners, competing sellers, vandals, etc. -- thereby breaking the causal chain. While we acknowledge the real possibility of confounding variables, at this stage in the proceeding the City's alleged chain of causation is perfectly plausible: taking the City's allegations as true, the Bank's extensive pattern of discriminatory lending led to substantially more defaults on its predatory loans, leading to a higher rate of foreclosure on minority-owned property and thereby reducing the City's tax base. See Cnty. of Cook v. Wells Fargo & Co., No. 14 C 9548, 2015 WL 4397842, at *3-4 (N.D. Ill. July 17, 2015) (finding the same causal allegation sufficient for Article III traceability in a materially identical FHA case and citing eight other district court cases finding the same). Moreover, the complaint supports its allegations with regression analyses that link the Bank's treatment of minority borrowers to predatory loans, predatory loans to foreclosure, and foreclosure to reduced tax revenue. Complaint at 6, 37-38, 44, 46. All told, the City has "allege[d] . . . facts essential to show jurisdiction." FW/PBS, 493 U.S. at 231 (quoting McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936)).

Of course, the City has limited its claim only to those damages arising from foreclosures caused by

the Bank's lending practices. At a subsequent stage in the litigation it may well be difficult to prove which foreclosures resulted from discriminatory lending, how much tax revenue was actually lost as a result of the Bank's behavior, etc. But at this early stage, the claim is plausible and sufficient. The City has said enough to establish Article III standing.[7]

2. "Statutory Standing"

The district court dismissed the City's claim, however, not on the basis of Article III standing, but because it lacked what the court characterized as "statutory standing." It found that the City fell outside the FHA's "zone of interests," and that its harm was not proximately caused by the Bank's actions. Ultimately, we disagree with the district court's legal conclusions. As for the zone of interests, we conclude that we are bound by Supreme Court precedent stating that so-called statutory standing under the FHA extends as broadly as Article III will permit, and find that this includes the City. As for proximate cause, we agree that it must be pled for a damages claim under the FHA, but find that the City has adequately done so here.

Notably, the Supreme Court recently clarified in Lexmark International, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014), that the longstanding doctrinal label of "statutory standing"

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[7] The third Lujan factor, redressability, is not at issue in this appeal. The City has "allege[d] a monetary injury and an award of compensatory damages would redress that injury." Resnick v. AvMed, Inc., 693 F.3d 1317, 1324 (11th Cir. 2012).

(sometimes also called "prudential standing") is misleading. The proper inquiry is whether the plaintiff "has a cause of action under the statute." Id. at 1387. But that inquiry isn't a matter of standing, because "the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the case." Id. at 1387 n.4 (quoting Verizon Md. Inc. v. Public Serv. Comm'n of Md., 535 U.S. 635, 642-643 (2002)). Instead, it is "a straightforward question of statutory interpretation." Id. at 1388.

This issue comes before the Court on a motion to dismiss for failure to state a claim, and the City's pleadings are evaluated for plausibility using the standard set forth in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 556 U.S. 662 (2009). "The complaint must contain enough facts to make a claim for relief plausible on its face; a party must plead 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Resnick v. AvMed, Inc., 693 F.3d 1317, 1324-25 (11th Cir. 2012) (quoting Iqbal, 556 U.S. at 678). Of course, in evaluating the plausibility of the claim we must take all of the plaintiff's factual allegations as true. See Iqbal, 556 U.S. at 678.

a. Zone of Interests

In general, a statutory cause of action "extends only to those plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" Lexmark, 134 S. Ct. at 1388 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). The Supreme

Court has instructed us that this test "applies to all statutorily created causes of action," but its application is not uniform: "certain statutes . . . protect a more-than-usually 'expansive' range of interests." Id. (quoting Bennett v. Spear, 520 U.S. 154, 164 (1997)) (alteration adopted).

> The FHA provides that
>
> [a]n aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice . . . to obtain appropriate relief with respect to such discriminatory housing practice or breach.

42 U.S.C. § 3613(a)(1)(A). It defines an "aggrieved person" as anyone who "claims to have been injured by a discriminatory housing practice," or "believes that such person will be injured by a discriminatory housing practice that is about to occur." Id. at § 3602(i).

The Bank claims that the City is not an "aggrieved person," and, therefore, falls outside the statute's zone of interests and cannot state a cause of action under the FHA. The City argues, however, that "FHA statutory standing is as broad as the Constitution permits under Article III," and therefore it is within the statute's zone of interests. Older Supreme Court cases appear to support the City's view, while certain more recent cases -- as well as an older decision of this Court -- have cast some doubt on the viability of those holdings. The answer requires carefully parsing both Supreme Court and

Eleventh Circuit precedent, and a review of the relevant cases is instructive.

i. Early Supreme Court cases

The first major FHA case explicated by the Supreme Court is Trafficante v. Metropolitan Life Insurance, 409 U.S. 205 (1972). Two tenants of an apartment complex -- one black, one white -- alleged that the landlord discriminated against minorities on the basis of race when renting units, in violation of the FHA. Id. at 206-07. The Court held that standing under the Act was defined "as broadly as is permitted by Article III of the Constitution . . . insofar as tenants of the same housing unit that is charged with discrimination are concerned." Id. at 209 (quotation omitted). "The language of the Act is broad and inclusive," the Court wrote, and "the alleged injury to existing tenants by exclusion of minority persons from the apartment complex is the loss of important benefits from interracial associations." Id. at 209-10.

Seven years later, in Gladstone, the Village of Bellwood brought suit under the FHA against two real estate firms for "steering" black and white homeowners into targeted, race-specific neighborhoods, thereby "manipulat[ing] the housing market," "affecting the village's racial composition," and causing "[a] significant reduction in property values." 441 U.S. at 109-10. The Court concluded that the village had stated a cause of action under the FHA and reaffirmed, based on the legislative history and purpose of the statute, that statutory standing under the FHA "is as broad as is permitted

by Article III of the Constitution." Id. at 109 (quotation omitted and alteration adopted).

Next came Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982), in which -- along with other plaintiffs -- a nonprofit corporation whose purpose was "to make equal opportunity in housing a reality in the Richmond Metropolitan Area" brought an FHA claim against a realty firm for racial steering (i.e., fostering racial segregation by guiding prospective buyers towards or away from certain apartments based on the buyer's race). In the clearest and most unambiguous terms, the Supreme Court reiterated the holding of Gladstone: "Congress intended standing under [the FHA] to extend to the full limits of Art. III and . . . the courts accordingly lack the authority to create prudential barriers to standing in suits brought under [the FHA]." Id. at 372 (quotation omitted). As the Court explained, "the sole requirement for standing to sue under [the FHA] is the Art. III minima of injury in fact: that the plaintiff allege that as a result of the defendant's actions he has suffered 'a distinct and palpable injury.'" Id. (quoting Warth v. Seldin, 422 U.S. 490, 501 (1975)). The organization's allegation that the racial steering "perceptibly impaired [its] ability to provide counseling and referral services for low- and moderate-income homeseekers" was sufficient to constitute injury in fact for purposes of Article III (and statutory) standing. Id. at 379.

ii. Nasser

Less than a month after Havens, the Eleventh Circuit issued an opinion in Nasser, 671 F.2d 432, on

which the district court and the Bank principally rely. In Nasser, property owners challenged a zoning ordinance that rezoned their property from multi-family residential to single-family residential, alleging, inter alia, that the ordinance violated the FHA. Id. at 434. In 1976, the plaintiffs entered into an agreement with a developer for the construction of a multi-family housing complex on their property. The developer had looked into the possibility of making some units of this complex available for low- and moderate-income families via rent subsidies, and had inquired with the Department of Housing and Urban Development. But the development never materialized. A detailed affidavit from a member of the county planning commission stated that the plaintiffs had never suggested that their purpose "was to build a multi-family project for the use and benefit of low income or minority groups." Id. at 435. Instead, the affidavit claimed that the plaintiffs had represented their project as "an exclusive-high rent apartment complex." Id. The Court found that there was no "evidence that the 1976 project was in any way affected by or related to racial or other minority interests." Id.

Three years later, the land was re-zoned. Id. at 434. The plaintiffs claimed that the re-zoning had reduced the value of their property by more than 50% (from $285,000 to $135,000). See id. at 435. A panel of this Court concluded that the plaintiffs lacked statutory standing under the FHA despite this purported economic injury. In making this determination, the Court considered Trafficante and Gladstone, and concluded: "There is no indication that the [Supreme] Court intended to extend

standing, beyond the facts before it, to plaintiffs who show no more than an economic interest which is not somehow affected by a racial interest." Id. at 437. The Nasser Court found that the property owners lacked an economic interest affected by a racial interest, and therefore lacked standing to sue under the FHA. Id. at 438.

iii. Newer Supreme Court cases on statutory standing

Two recent Supreme Court cases have cast some doubt on the broad interpretation of FHA statutory standing in Trafficante, Gladstone, and Havens. In Thompson v. North American Stainless, LP., 562 U.S. 170 (2011), the Court considered whether an employee had a cause of action under Title VII, which uses nearly identical statutory language to the FHA. See 42 U.S.C. § 2000e-5(f)(1) ("[A] civil action may be brought . . . by the person claiming to be aggrieved."). The Court rejected the argument that this language expanded statutory standing to the limits of Article III. Id. at 177. Instead, it drew an analogy to the Administrative Procedure Act (which contains similar language) and held that plaintiffs must "fall[] within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." Id. at 177-78 (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 883 (1990)).

The Court acknowledged that this analysis was in some tension with Trafficante and Gladstone. But in glossing Trafficante, the Thompson Court focused on language in the opinion that arguably limited the

holding to its facts: the Trafficante Court stated that standing under the FHA was coextensive with Article III only "insofar as tenants of the same housing unit that is charged with discrimination are concerned." Id. at 176 (quoting Trafficante, 409 U.S. at 209). The Thompson Court acknowledged that later cases (such as Gladstone) reiterated that standing under the FHA "reaches as far as Article III permits" without any limiting language, but it stated that "the holdings of those cases are compatible with the 'zone of interests' limitation" that the Court went on to read into Title VII. Id. at 177.

Finally, the Supreme Court's recent opinion in Lexmark (interpreting the Lanham Act) discarded the labels "prudential standing" and "statutory standing," and clarified that the inquiry was really a question of statutory interpretation, and not standing at all. 134 S. Ct. at 1386-87 & n.4. One aspect of this interpretation, the Court explained, was a zone of interests analysis, which "requires [the court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiffs claim." Id. at 1387. The Court went on to say that this zone of interests test "applies to all statutorily created causes of action." Id. at 1388. Lexmark did not mention the FHA or any of the Court's FHA cases.

iv. Analysis

The scope and role of the zone of interests analysis in the FHA context is a difficult issue, and one that has sharply divided the courts that have considered

it. Compare, e.g., Cnty. of Cook, 2015 WL 4397842, at *5-6 (holding that Thompson and Lexmark effectively overruled the Supreme Court's interpretation of FHA statutory standing as being coextensive with Article III standing), with, e.g., City of Los Angeles v. JPMorgan Chase & Co., No. 2:14-CV-04168-ODW, 2014 WL 6453808, at *6 (C.D. Cal. Nov. 14, 2014) (finding that the Supreme Court's original interpretation of FHA statutory standing remained good law after Thompson and Lexmark). Ultimately, we disagree with the district court, and hold that the phrase "aggrieved person" in the FHA extends as broadly as is constitutionally permissible under Article III.

Simply put, Trafficante, Gladstone, and Havens have never been overruled, and the law of those cases is clear as a bell: "[statutory] standing under [the FHA] extends 'as broadly as is permitted by Article III of the Constitution.'" Gladstone, 441 U.S. at 98 (quoting Trafficante, 409 U.S. at 209); accord Havens, 455 U.S. at 372. While Thompson has gestured in the direction of rejecting that interpretation, a gesture is not enough. The rule governing these situations is clear: "if a precedent of the Supreme Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court[] the prerogative of overruling its own decisions." Evans v. Sec'y, Fla. Dep't of Corr., 699 F.3d 1249, 1263 (11th Cir. 2012) (quotation omitted and alterations adopted); accord Tenet v. Doe, 544 U.S. 1, 10-11 (2005). In other words, "the Supreme Court has insisted on reserving to itself the

task of burying its own decisions." Evans, 699 F.3d at 1263 (quotation omitted).

Notably, Thompson itself was a Title VII case, not a Fair Housing Act case. Thompson surveyed Trafficante and Gladstone, but did not explicitly overrule them -- nor could it, given the different statutory context in which it arose. Instead, the Court held that any suggestion drawn from the FHA cases that Title VII's cause of action is similarly broad was "ill-considered" dictum. Thompson, 562 U.S. at 176. It's true that Title VII contains nearly identical statutory language to the FHA, and therefore the Thompson Court's interpretation of Title VII may signal that the Supreme Court is prepared to narrow its interpretation of the FHA in the future. (The dicta in Thompson indicating that its Title VII interpretation is "compatible" with the Court's previous FHA holdings suggests as much. See 562 U.S. at 176-77.) But that day has not yet arrived, and until it does, our role as an inferior court is to apply the law as it stands, not to read tea leaves. The still-undisturbed holding of the Supreme Court's FHA cases is that the definition of an "aggrieved person" under the FHA extends as broadly as permitted under Article III.

This Court's binding precedent in Nasser is not to the contrary. Nasser stands for the unremarkable proposition that a plaintiff has no cause of action under the FHA if he makes no allegation of discrimination (or disparate impact) on the basis of race (or one of the FHA's other protected characteristics: color, religion, sex, handicap, familial status, and national origin). The allegation of

discrimination provides the "racial interest" Nasser requires to bring an economic injury within the scope of the statute. 671 F.2d at 437. The Nasser plaintiffs' claim was unrelated to race (or any protected FHA characteristic) altogether; they simply objected to the rezoning of their property because it cost them money. As the Nasser Court put it, the plaintiffs' "interest in [the] value of the property in no way implicate[d] [the] values protected by the Act." Id.

Indeed, this is exactly how subsequent Eleventh Circuit caselaw has treated Nasser. In Baytree of Inverrary Realty Partners v. City of Lauderhill, 873 F.2d 1407 (11th Cir. 1989) -- the only case of this Court to revisit or reference Nasser's treatment of the FHA -- we held that a non-minority real estate developer, Baytree, stated a claim under the FHA when it challenged the city's decision to rezone its property, alleging that the decision was racially motivated and rendered the property worthless. Id. at 1408. We distinguished Nasser as a case "in which plaintiffs alleged only an economic injury unaffected by any racial interest," and found it inapposite because Baytree had properly alleged that its injury "result[ed] from racial animus." Id. at 1409. The same is true of the City of Miami's claim. Like Baytree, the City claims to have suffered an economic injury resulting from a racially discriminatory housing policy; in neither case does Nasser prevent the plaintiff from stating a claim under the FHA.

In sum, we agree with the City that the term "aggrieved person" in the FHA sweeps as broadly as allowed under Article III; thus, to the extent a zone

of interests analysis applies to the FHA, it encompasses the City's allegations in this case. The City's claim does not suffer from the same flaw as the Nasser plaintiffs', because the City has specifically alleged that its injury is the result of a Bank policy either expressly motivated by racial discrimination or resulting in a disparate impact on minorities.

b. Proximate Cause

The district court also concluded that the City's pleadings did not sufficiently allege that the Bank's lending practices were a proximate cause of the City's injury. It determined that the City had not "allege[d] facts that isolate Defendants' practices as the cause of any alleged lending disparity" compared to the background factors of a cratering economy and the actions of independent actors such as "loan services, government entities, competing sellers, and uninterested buyers." City of Miami v. Bank of America Corp., 2014 WL 3362348, at *5. It also found that the City's statistical analyses indicating that foreclosures caused economic harm were "insufficient to support a causation claim," because some of the studies were not limited to Miami, some were not limited to the defendants' practices, and some did not control for relevant credit factors. Id. The plaintiffs disagree, arguing that they need not plead proximate causation at all, only the lesser "traceability" required by Article III. In the alternative, they say that their pleadings were sufficient under either standard. Although we agree with the Bank and the district court that proximate cause is a required element of a damages claim

under the FHA, we find that the City has pled it adequately.

In Lexmark, the Supreme Court illuminated the doctrine of proximate cause as it relates to statutory causes of action. "[W]e generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute." 134 S. Ct. at 1390. This principle reflects "the reality that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing," as well as the Court's assumption that Congress is familiar with the traditional common-law rule and "does not mean to displace it sub silentio." Id. (quotation omitted). The Court made clear that proximate causation is not a requirement of Article III, but rather an element of the cause of action under a statute, and it "must be adequately alleged at the pleading stage in order for the case to proceed." Id. at 1391 n.6. The Supreme Court has read a variety of federal statutory causes of action to contain a proximate cause requirement. See, e.g., Lexmark, 134 S. Ct. at 1390-93 (Lanham Act); Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 346 (2005) (securities fraud); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 265-68 (1992) (RICO); Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 529-35 (1983) (Clayton Act).

Although proximate cause "is not easy to define," the basic inquiry is "whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." Lexmark, 134 S. Ct. at 1390. The requirement is "more restrictive than a requirement

of factual cause alone," Paroline v. United States, 134 S. Ct. 1710, 1720 (2014), and we have said that it demands "something [more]" than Article III traceability, Focus on the Family v. Pinellas Suncoast Transit Auth., 344 F.3d 1263, 1273 (11th Cir. 2003); see also Lexmark, 134 S. Ct. at 1391 n.6. But the nature of the proximate cause requirement differs statute by statute: it is "controlled by the nature of the statutory cause of action," so the scope of liability depends on the statutory context. Lexmark, 134 S. Ct. at 1390.

No case of the Supreme Court or this Court has ever dealt directly with the existence or application of a proximate cause requirement in the FHA context. But certain statements by the Supreme Court suggest that proximate cause must exist for a damages action brought under the FHA. First, the Lexmark Court characterized proximate cause as a "general[] presum[ption]" in statutory interpretation. Id. at 1390. Moreover, the Supreme Court has observed that an FHA damages claim is "in effect, a tort action," governed by general tort rules, Meyer v. Holley, 537 U.S. 280, 285 (2003); Curtis v. Loether, 415 U.S. 189, 195 (1974) ("A damages action under the [FHA] sounds basically in tort -- the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach."), and proximate cause is a classic element of a tort claim, see Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts § 198 (2d ed. 2011). If the City's claim is functionally a tort action, then presumably the City must adequately plead proximate cause, just like any other plaintiff raising any tort claim. At least two of

our sister circuits appear to have reached the same conclusion. See Pac. Shores Props., LLC v. City of Newport Beach, 730 F.3d 1142, 1167-68 & n.32 (9th Cir. 2013) (noting that a damages action under the FHA "sounds basically in tort" and applying a proximate cause requirement), cert. denied sub nom. City of Newport Beach v. Pac. Shores Props., LLC, 135 S. Ct. 436 (2014); Samaritan Inns, Inc. v. Dist. of Columbia, 114 F.3d 1227, 1234-35 (D.C. Cir. 1997) (same); see also Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp., No. 3:10-CV-83, 2015 WL 853193, at *4-5 (S.D. Ohio Feb. 26, 2015) (holding that a fair housing organization must establish proximate cause because it is "one step removed from the discrimination," so its claimed damages must be "t[ied] . . . to the defendant's alleged wrongdoing").[8]

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[8] We recognize that our conclusion that a private cause of action under the FHA contains a proximate cause requirement may be in some tension with the Supreme Court's general holding that statutory standing under the FHA extends as broadly as permitted under Article III. As we've explained, Article III's only causation requirement is that the plaintiff's injury be "fairly traceable" to the defendant's unlawful conduct. Defs. of Wildlife, 504 U.S. at 590 (quoting Allen, 468 U.S. at 751). Plainly, proximate cause is not an element of constitutional standing. See Lexmark, 134 S. Ct. at 1391 n.6. Nonetheless, we do not interpret Trafficante, Gladstone, or Havens to have read a proximate cause requirement out of the statute. Nothing in those cases decided, or even asked, whether some kind of proximate cause requirement is an element of an FHA claim.

To the extent those cases addressed Article III standing, they were concerned with what we call today the first Lujan factor: injury in fact -- an injury that is "concrete and particularized," and "actual or imminent." Defs. of Wildlife, 504 U.S. at 560. In Trafficante, the plaintiffs were two tenants, one black, one

The Bank argues that proximate cause creates a "directness requirement" within the FHA, and that the City's pleadings, therefore, fail because they do not allege that the Bank's actions directly harmed the City. The City does not accuse the Bank of discriminating against the City itself in its lending practices; instead, it claims that the Bank's discriminatory practices led the City to lose tax

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white, who had lost the benefit of interracial associations; causation was not discussed. 409 U.S. at 206; see Gladstone, 441 U.S. at 112-13 (characterizing Trafficante's holding as turning on Article III's injury-in-fact requirement). In Gladstone, causation was again not considered, except for a suggestion in dicta that evidence of the defendant's business practices might "be relevant to the establishment of the necessary causal connection between the alleged conduct and the asserted injury" in later stages of litigation. Id. at 114 n.29. Finally, in Havens, the Court did not discuss causation; "the question before [the Court] . . . [was] whether injury in fact ha[d] been sufficiently alleged." 455 U.S. at 376 (emphasis added). Nothing in the holdings of these cases speaks to the existence of a proximate cause requirement, let alone bars us from interpreting the FHA to require a showing of proximate cause for damages actions.

Moreover, it seems inconceivable that the FHA would not contain a proximate cause requirement of some sort, because the alternative would produce seemingly absurd results. Requiring nothing but Article III traceability for FHA damages actions would create an open-ended fount of liability, particularly for plaintiffs (like the City of Miami) who are at least one step removed from the defendant's discriminatory conduct. This, of course, is why proximate cause is a classic element of a tort action -- and, as we have said, the Supreme Court has observed that damages claims under the FHA are essentially tort actions. Indeed, this statutory interpretation, rooted in the nature of the cause of action, has now been embraced by all three circuit courts of appeals to have addressed the issue.

revenue and spend money combating the resulting blight. This harm, the Bank claims, is too indirect to have been proximately caused by the Bank's conduct.

We disagree. The Bank proposes to draw its proximate cause test from other statutory contexts, primarily from the Supreme Court's interpretation of the Racketeer Influenced and Corrupt Organizations Act (RICO) in Holmes, 503 U.S. 258. In that case, the Court read a proximate cause requirement into RICO, reasoning that its statutory language (granting a cause of action to anyone injured "by reason of" a violation of 18 U.S.C. § 1692, see 18 U.S.C. § 1964(c)) mirrored language used in the antitrust statutes, which had long been interpreted to contain such a requirement. See Holmes, 503 U.S. at 267-68. One of the "central elements" of proximate cause in the RICO and antitrust context, the Court explained, is "a demand for some direct relation between the injury asserted and the injurious conduct alleged." Id. at 268-69; see, e.g., Simpson v. Sanderson Farms, Inc., 744 F.3d 702, 712 (11th Cir. 2014) (applying the Holmes directness requirement in a civil RICO case); cf Lexmark, 134 S. Ct. at 1390 (appearing to endorse a directness requirement by noting that a claim "ordinarily" fails to allege proximate cause when "the harm [to the plaintiff] is purely derivative of 'misfortunes visited upon a third person by the defendant's acts'" (quoting Holmes, 503 U.S. at 268)). The Bank argues that proximate cause in the FHA context must be the same.

But the Supreme Court in Lexmark made clear that proximate cause is not a one-size-fits-all analysis: it can differ statute by statute. Thus, for

example, Lexmark involved an allegation of false advertising under the Lanham Act brought by one company against a rival. As the Court noted, all such injuries "are derivative of those suffered by consumers who are deceived by the advertising." 134 S. Ct. at 1391. A claim based on such a derivative injury might not satisfy proximate cause under a statute that strictly requires a direct connection between the plaintiff's harm and the defendant's conduct. Nevertheless, the Court found that the claim satisfied proximate causation under the Lanham Act: because the statute authorized suit "only for commercial injuries," the derivative nature of the plaintiff's claim could not be "fatal" to the plaintiffs cause of action. Id. In other words, the statutory context shaped the proximate cause analysis. So, too, in this case.

The FHA's proximate cause requirement cannot take the shape of the strict directness requirement that the Bank now urges on us: indeed, such a restriction would run afoul of Supreme Court and Eleventh Circuit caselaw allowing entities who have suffered indirect injuries -- that is, parties who have not themselves been directly discriminated against -- to bring a claim under the FHA. Notably, the Village of Bellwood in Gladstone was permitted to bring an FHA claim even though it was not directly discriminated against. 441 U.S. at 109-11. So, too, was the non-profit corporation in Havens, which alleged impairment of its organizational mission and a drain on its resources, not direct discrimination. 455 U.S. at 378-79. And in our own Circuit, the same is true of the plaintiff in Baytree, a non-minority developer who challenged a city's zoning decision as

racially discriminatory. 873 F.2d at 1408-09. Indeed, the Supreme Court in Havens instructed that the distinction between direct and indirect harms -- or, as the Havens Court characterized it, the difference "between 'third-party' and 'first-party' standing" -- was "of little significance in deciding" whether a plaintiff had a cause of action under the FHA. 455 U.S. at 375; see Pac. Shores Props., 730 F.3d at 1168 n.32 ("The fact that FHA plaintiffs' injuries must be proximately caused by the defendants' discriminatory acts does not, of course, mean that defendants are not liable for foreseeable, but indirect, effects of discrimination.").

In examining RICO and the antitrust statutes, the Supreme Court has looked to the statutory text and legislative history to determine the scope and meaning of the proximate cause requirement. See Holmes, 503 U.S. at 265-68. Neither party has presented any argument based on these considerations. However, the Supreme Court has observed that the language of the FHA is "broad and inclusive," Trafficante, 409 U.S. at 209, and must be given "a generous construction," id. at 212. What's more, while the Supreme Court has cautioned that "[t]he legislative history of the [the FHA] is not too helpful" in determining the scope of its cause of action, it observed that the FHA's proponents "emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered." Id. at 210. In short, nothing in the text or legislative history of the FHA supports the Bank's cramped interpretation.

As we've noted, damages claims arising under the FHA have long been analogized to tort claims. Thus, we look to the law of torts to guide our proximate cause analysis in this context. We agree with the City that the proper standard, drawing on the law of tort, is based on foreseeability.[9] See Dobbs, Hayden & Bublick, supra, § 199, at 686 ("Professional usage almost always reduces proximate cause issues to the question of foreseeability. The defendant must have been reasonably able to foresee the kind of harm that was actually suffered by the plaintiff . . ."); see also Pac. Shores Props., 730 F.3d at 1168 & n.32 (noting in the FHA context that "the doctrine of proximate cause serves merely to protect defendants from unforeseeable results" of their unlawful conduct, and that defendants are "liable for foreseeable . . . effects of discrimination.").

Under this standard, the City has made an adequate showing. The complaint alleges that the Bank had access to analytical tools as well as published reports drawing the link between predatory lending practices "and their attendant harm," such as premature foreclosure and the resulting costs to the City, including, most notably, a reduction in property tax revenues. Complaint at 8-9, 26-27, 32-33, 4748, 50. The district court rejected the plaintiffs' claim partly because it failed to "allege facts that isolate Defendants' practices as the cause

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[9] We acknowledge that the Supreme Court has rejected foreseeability as the touchstone of proximate cause "in the RICO context," Hemi Grp., LLC v. City of New York, 559 U.S. 1, 12 (2010), but we have already explained why that statutory context does not govern our analysis today.

of any alleged lending disparity." City of Miami v. Bank of America Corp., 2014 WL 3362348, at *5. But as we have said even in the more restrictive RICO context, proximate cause "is not . . . the same thing as . . . sole cause." Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1399 (11th Cir.), opinion modified on reh'g, 30 F.3d 1347 (11th Cir. 1994); see Dobbs, Hayden & Bublick, supra, § 198, at 683 ("[The proximate cause requirement] does not mean that the defendant's conduct must be the only proximate cause of the plaintiff's injury."). Instead, a proximate cause is "a substantial factor in the sequence of responsible causation." Cox, 17 F.3d at 1389 (quotation omitted). The City has surely alleged that much: it claims that the Bank's discriminatory lending caused property owned by minorities to enter premature foreclosure, costing the City tax revenue and municipal expenditures. Although there are several links in that causal chain, none are unforeseeable. See Dobbs, Hayden & Bublick, supra, § 204, at 705 (explaining that intervening causes become "superseding" only if they are unforeseeable). And, as we noted in the context of Article III traceability, the City has provided the results of regression analyses that purport to draw the connection between the Bank's conduct toward minority borrowers, foreclosure, and lost tax revenue. This empirical data is sufficient to "raise the pleadings above the speculative level." Dekalb Cnty. v. HSBC N. Am. Holdings, Inc., No. 1:12-CV-03640-SCJ, 2013 WL 7874104, at *7 (N.D. Ga. Sept. 25, 2013); see Twombly, 550 U.S. at 555; cf. Maya v. Centex Corp., 658 F.3d 1060, 1073 (9th Cir. 2011) ("Expert testimony can be used to explain the causal

connection between defendants' actions and plaintiffs' injuries, even in the context of other market forces.").[10]

In the face of longstanding caselaw drawn from the Supreme Court and this Court permitting FHA claims by so-called third party plaintiffs who are injured by a defendant's discrimination against another person, it is clear that the harm the City claims to have suffered has "a sufficiently close

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[10] The Bank also makes much of City of Cleveland v. Ameriquest Mortgage Sec., Inc., 615 F.3d 496 (6th Cir. 2010), a Sixth Circuit case brought by the City of Cleveland against various financial entities that it claimed were responsible for a large portion of the Cleveland subprime lending market and a foreclosure crisis that devastated local neighborhoods. Id. at 498-99. The Sixth Circuit held that the city's claims did not adequately plead proximate cause, in part because "the cause of the alleged harms is a set of actions (neglect of property, starting fires, looting, and dealing drugs) that is completely distinct from the asserted misconduct (financing subprime loans)." Id. at 504. The defendants insist that the same analysis applies here. But City of Cleveland is readily distinguishable. Most glaringly, the city in that case brought a state-law public nuisance claim, not an FHA claim. Id. at 498. Ohio law had adopted its proximate cause test from Holmes, which we have already explained is inapposite, and the court in no way suggested that an identical proximate cause requirement existed in the FHA. Id. at 503. Moreover, the defendants in that case "did not originate the subprime mortgages at issue" -- rather, they "finance[ed], purchas[ed], and pool[ed] . . . vast amounts of these loans," creating mortgage-backed securities that were then sold to the public. Id. at 499. It was this financial activity that Cleveland challenged as a public nuisance, not the original issuance of the loans. Thus, the Cleveland defendants' activity was one step further removed than the activity of the Bank in this case, which issued the allegedly predatory loans in the first instance.

connection to the conduct the statute prohibits." Lexmark, 134 S. Ct. at 1390. Of course, whether the City will be able to actually prove its causal claims is another matter altogether. At this stage, it is enough to say that the City has adequately pled proximate case, as required by the FHA.

3. Statute of Limitations

The FHA also requires that claims be filed "not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice." 42 U.S.C. § 3613(a)(1)(A). The district court concluded, and the parties do not contest, that an FHA claim for issuing a discriminatory loan begins to run from the date that the loan closes. City of Miami v. Bank of America Corp., 2014 WL 3362348, at *6; see Estate of Davis v. Wells Fargo Bank, 633 F.3d 529, 532 (7th Cir. 2011) (calculating FHA statute of limitations for a predatory loan beginning with the date the loan was issued).

This lawsuit was filed on December 13, 2013. Thus, in a traditional statute of limitations analysis, the complained-of loans must have closed after December 13, 2011. The City maintains that it has alleged a pattern and practice of discriminatory lending by the Bank, and its claims, therefore, qualify for the application of the "continuing violation doctrine." The district court disagreed, finding that the City had not alleged facts sufficient to support its allegation that the specific practices continued into the statutory period. We remain unpersuaded.

The complaint alleged that the City had identified 3,326 discriminatory loans issued by the Bank in Miami between 2004 and 2012 that had resulted in foreclosure. Complaint at 50-51. It then listed ten specific property addresses that it claimed "corresponded to these foreclosures," but provided no specific information (e.g., the type of loan, the characteristics that made it predatory or discriminatory, when the loan closed, when the property went into foreclosure, etc.) for each address. Id. at 51. (The City also claimed that "with the benefit of discovery," it "anticipate[d] . . . be[ing] able to identify more foreclosures resulting from the issuance of discriminatory loans." Id. at 51 n.35.) As the district court noted, however, the City failed to allege that any of the loans closed within the limitations period (between December 13, 2011, and December 13, 2013).

On appeal, the City does not contend that its original complaint was adequate; rather, it argues that it could readily cure the statute of limitations flaws if given the opportunity. In support, the City points to the proposed amended complaint that it provided along with its motion for reconsideration and motion to amend. The district court acknowledged that the City might indeed be able to remedy its statute of limitations deficiencies with an amendment, but the court never considered whether the City's proposed amended complaint was sufficient, because it concluded that the City remained outside the statute's zone of interests and had not adequately pled proximate cause. Because the district court erred both as to the zone of interests and proximate cause, we are obliged to

remand the cause of action in the first instance to determine whether or not the City could remedy any statute of limitations deficiency. We decline to evaluate the City's proposed amended complaint before the district court has had the opportunity to do so. See Adinolfe v. United Techs. Corp., 768 F.3d 1161, 1172 (11th Cir. 2014) ("[A]s an appellate tribunal, we are generally limited to reviewing arguments and issues that have been raised and decided in the district court.").

In order to provide guidance on remand, we offer this discussion of the application of the continuing violation doctrine to this case. In addition to noting that the City never alleged that any particular loan closed within the limitations period (a deficiency that may well be cured in an amended pleading), the district court also seemingly held that the City's claim could not qualify for the application of the continuing violation doctrine because the complaint did not identify a singular and uniform practice of continuing conduct.

The continuing violation doctrine applies to "the continued enforcement of a discriminatory policy," and allows a plaintiff to "sue on otherwise time-barred claims as long as one act of discrimination has occurred . . . during the statutory period." Hipp v. Liberty Nat. Life Ins. Co., 252 F.3d 1208, 1221 (11th Cir. 2001) (per curiam). The governing law on the continuing violation doctrine in the FHA context is drawn from the Supreme Court's decision in

Havens. In that case, three plaintiffs[11] -- a black individual looking to rent an apartment, a black "tester," and a white "tester"[12] -- brought FHA claims. Havens, 455 U.S. at 368. Their lawsuit was filed on January 9, 1979. Coles v. Havens Realty Corp., 633 F.2d 384, 386 (4th Cir. 1980), aff'd in part, rev'd in part sub nom. Havens, 455 U.S. 363. At the time, the limitations period under the FHA was 180 days. The plaintiffs identified five separate incidents of discrimination: on March 14, March 21, March 23, July 6, and July 13 of 1978. Only the incident on July 13 was within the limitations period. See Havens, 455 U.S. at 380.

On March 14, March 21, and March 23, the two testers asked Havens about available apartments. Each time, the black tester was told that nothing was available, while the white tester was told that there were vacancies. Id. at 368. On July 6, the black tester made a further inquiry and was told that there were no vacancies, while another white tester (not a party to the suit) was told that there were openings. Id. Finally, on July 13 -- the only incident within the limitations period -- the black plaintiff who was genuinely looking to rent asked Havens about availability and was falsely told that there was nothing. Id.

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[11] As discussed earlier, there was also a fourth plaintiff: a non-profit corporation. Havens, 455 U.S. at 367. Its claim is not relevant to the discussion of the statute of limitations.

[12] The testers posed as renters for the purpose of collecting evidence of unlawful racial steering practices.

All three plaintiffs alleged that Havens's practices deprived them of the benefits of living in an integrated community. Id. at 369. The Supreme Court held that the claims were not time-barred for any of the plaintiffs because they alleged a "continuing violation" of the FHA, despite the fact that only one discriminatory incident was within the limitations window, and that incident involved only one of the three plaintiffs. Id. at 380-81. "[A] 'continuing violation' of the Fair Housing Act should be treated differently from one discrete act of discrimination," the Court explained. Id. at 380. The Court reasoned that "[w]here the challenged violation is a continuing one," there is no concern about the staleness of the plaintiff's claims. Id. Moreover, the Court emphasized "the broad remedial intent of Congress embodied in the [Fair Housing] Act" in rejecting the defendants' "wooden application" of the statute of limitations. Id. The Court concluded: "where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [the limitations period, starting at] the last asserted occurrence of that practice." Id. at 380-81.

The case before us -- if the City is able to identify FHA violations within the limitations period -- is on all fours with Havens. The City has alleged "not just one incident . . . but an unlawful practice that continues into the limitations period." Id. at 381. The City alleges that the Bank has engaged in a longstanding practice of discriminatory lending in which it extends loans to minority borrowers only on

more unfavorable terms than those offered to white borrowers. The predatory qualities of the loans have taken slightly different forms over time (e.g., higher interest rates, undisclosed back-end premiums, higher fees, etc.), but the essential discriminatory practice has remained the same: predatory lending targeted at minorities in the City of Miami. The fact that the burdensome terms have not remained perfectly uniform does not make the allegedly unlawful practice any less "continuing." The various instances of discriminatory lending comprise the practice, which continues into the limitations period. At least at the pleading stage, this is enough to plausibly invoke the continuing violation doctrine. See **City of Los Angeles**, 2014 WL 6453808, at *7 ("The City's allegations of discrimination under the FHA relate to Chase's lending practices overall, not a specific type of loan issued. The Court finds the allegations sufficient to apply the continuing violations doctrine."); **City of Los Angeles v. Citigroup Inc.**, 24 F. Supp. 3d 940, 952 (C.D. Cal. 2014) ("In this case, [the plaintiff] is alleging a pattern and practice of 'discriminatory lending' on the part of Defendants over at least an eight-year period. While the types of loans that Defendants allegedly issued to minority borrowers may have changed during the relevant time period, [the plaintiff] alleges that they remained high-risk and discriminatory. This is sufficient to apply the continuing-violation doctrine."); accord **City of Los Angeles v. Bank of Am. Corp.**, No. CV 13-9046 PA (AGRx), 2014 WL 2770083, at *10 (C.D. Cal. June 12, 2014); **City of Los Angeles v. Wells Fargo & Co.**, 22 F. Supp. 3d 1047, 105859 (C.D. Cal. 2014); see

also Hargraves v. Capital City Mortg. Corp., 140 F. Supp. 2d 7, 17-19 (D.D.C. 2000) (applying the continuing violation doctrine to an FHA claim challenging a mortgage company's practice of predatory and discriminatory lending, where that practice took various forms, including charging exorbitant interest rates, fraudulent fees and penalties, inadequate risk assessment, and elevated rates of foreclosure).

4. Remand

Resolving a plaintiffs motion to amend is "committed to the sound discretion of the district court," but that discretion "is strictly circumscribed" by Rule 15(a)(2) of the Federal Rules of Civil Procedure, which instructs that leave to amend should be "freely give[n] when justice so requires." Gramegna v. Johnson, 846 F.2d 675, 678 (11th Cir. 1988); see also Shipner v. E. Air Lines, Inc., 868 F.2d 401, 407 (11th Cir. 1989) ("[U]nless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial").

As we have explained, we find that the City is within the FHA's zone of interests and has sufficiently alleged proximate causation between its injury and the Bank's conduct. The district court's refusal to allow the City to amend, and its conclusion that any amended complaint would be futile, was legal error and therefore an abuse of discretion. On remand, the City should be granted leave to amend its complaint.

We also note that while this appeal was pending, the Supreme Court handed down a decision that may materially affect the resolution of this case. In Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015), a non-profit organization brought a Fair Housing Act claim against the Texas Department of Housing and Community Affairs, alleging that the Department's allocation of low-income housing tax credits caused racial segregation by "granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods." Id. at 2514. The claim was brought on a disparate-impact theory, alleging not that the Department's practice was driven by a discriminatory intent, but rather that it had a "'disproportionately adverse effect on minorities' and [was] otherwise unjustified by a legitimate rationale." Id. at 2513 (quoting Ricci v. DeStefano, 557 U.S. 557, 577 (2009)). The question before the Court was whether disparate-impact claims are cognizable under the FHA. The Court held that they are. Id. at 2525.

However, in dicta, the Court announced the "proper[] limit[s]" on disparate impact liability under the FHA, needed both to avoid serious constitutional issues and to protect potential defendants from abusive disparate-impact claims. Id. at 2522; see id. at 2522-24. Specifically, the Court noted that defendants must be allowed to "explain the valid interest served by their [challenged] policies," id. at 2522, and that courts should insist on a "robust causality requirement" at the "prima facie stage" linking the defendant's conduct to the racial

disparity, id. at 2523. The Court emphasized that disparate-impact claims must be aimed at "removing artificial, arbitrary, and unnecessary barriers," rather than "displac[ing] valid governmental and private priorities." Id. at 2524 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)) (alterations adopted). Any newly pled complaint must take into account the evolving law on disparate impact in the FHA context. Without the new pleadings before us, we have no occasion to pass judgment on how Inclusive Communities will impact this case, but we flag the issue both for the parties and for the district court on remand.

C. Unjust Enrichment Claim

As for the City's state law unjust enrichment claim, we agree with the district court and affirm its ruling. In deciding this claim, we are obliged to apply Florida's substantive law. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Where the highest state court has not provided the definitive answer to a question of state law, "we must predict how the highest court would decide this case," looking to the decisions of the lower state courts for guidance. See Molinos Valle Del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1348 (11th Cir. 2011). Under Florida law, the doctrine of unjust enrichment (sometimes called a "contract implied in law," "quasi-contract," and various other terms) governs the situation in which one party has conferred a valuable benefit on another in the absence of a contract, but "under circumstances that ma[ke] it unjust to retain it without giving compensation." See Magwood v. Tate, 835 So. 2d 1241, 1243 (Fla. Dist. Ct. App. 2003)

(quoting Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co., 695 So. 2d 383, 386 (Fla. Dist. Ct. App. 1997)). There are three elements of an unjust enrichment claim under Florida law: first, the plaintiff has conferred a benefit on the defendant; second, the defendant voluntarily accepted and retained that benefit; and, finally, the circumstances are such that it would be inequitable for the defendants to retain the benefit without paying for it. Virgilio v. Ryland Grp., Inc., 680 F.3d 1329, 1337 (11th Cir. 2012) (citing Fla. Power Corp. v. City of Winter Park, 887 So. 2d 1237, 1241 n.4 (Fla. 2004)). As for the first element, the benefit must be conferred directly from the plaintiff to the defendant. Century Senior Servs. v. Consumer Health Ben. Ass'n, Inc., 770 F. Supp. 2d 1261, 1267 (S.D. Fla. 2011) (citing Peoples Nat'l Bank of Commerce v. First Union Nat'l Bank of Fla., N.A., 667 So. 2d 876, 879 (Fla. Dist. Ct. App. 1996)). "At the core of the law of restitution and unjust enrichment is the principle that a party who has been unjustly enriched at the expense of another is required to make restitution to the other." Gonzalez v. Eagle Ins. Co., 948 So. 2d 1, 3 (Fla. Dist. Ct. App. 2006).

The City alleged that the Bank "received and utilized benefits derived from a variety of municipal services, including police and fire protection, as well as zoning ordinances, tax laws, and other laws and services that have enabled [the Bank] to operate and profit within the City of Miami." Complaint at 54. It went on to allege that "[a]s a direct and proximate result of [the Bank's] predatory lending practices, [the Bank] ha[s] been enriched at the City's expense" by utilizing those benefits while denying the City tax

revenue and costing it in additional municipal expenditures required to address foreclosed properties. The Bank "failed to remit those wrongfully obtained benefits," the complaint claimed. The City also alleged that it had paid for the Bank's externalities (the costs of the harm caused by the discriminatory lending patterns), that the Bank was aware of this benefit, and that its retention would be unjust. Id. at 55.

The district court dismissed the claim without prejudice, in part because the City had not alleged that it had conferred a direct benefit onto the Bank to which they were not otherwise legally entitled, as required under Florida law. As for the denied tax revenues, the district court noted that such a denial is not a direct benefit conferred on the Bank by the City. As for the municipal services, the district court found that they did not create an unjust enrichment claim for two reasons. First, the municipal services were not benefits conferred directly on the Bank -- the services were provided to the residents of Miami, not to the Bank, and any benefit the Bank received was merely derivative. Second, the City had not adequately alleged that the Bank, as a Miami property owner, was not legally entitled to those services. We agree.

The City maintains that its complaint states a cause of action under Florida law, but it has not cited to a single Florida case. The City relies primarily on White v. Smith & Wesson Corp., 97 F. Supp. 2d 816 (N.D. Ohio 2000), where the mayor and City of Cleveland sued various gun manufacturers and dealers alleging, inter alia, unjust enrichment on the

ground that the city had conferred a benefit on the defendants by paying for their "externalities": "the costs of the harm caused by Defendants' failure to incorporate safety devices into their handguns and negligent marketing practices." Id. at 829. The Ohio law of unjust enrichment essentially tracks Florida law. See id. ("In order to maintain a cause of action for unjust enrichment under Ohio law, a plaintiff must allege: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and, (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment."). Without citing to a single Ohio state court case in its unjust enrichment analysis, the district court determined that plaintiffs had stated such a claim under Ohio law.

The City cites only two other cases, neither of which were from Florida. See City of Boston v. Smith & Wesson Corp., No. 199902590, 2000 WL 1473568, at *18 (Mass. Super. Ct. July 13, 2000) (allowing an unjust enrichment claim against gun manufacturers under Massachusetts law on the same reasoning as was employed in White); City of New York v. Lead Indus. Ass'n, Inc., 190 A.D.2d 173, 177 (N.Y. App. Div. 1993) (permitting the City of New York's claim for restitution against manufacturers of lead-based paint for the City's expenditures in abating the hazard of lead-based paint and treating the victims). None of these cases, obviously, governs our application of Florida law.

We have not found any case -- and the City has provided none -- supporting an unjust enrichment

claim of this type under Florida law. First, the City alleges that the Bank must pay the City for the tax revenue the City has been denied due to the Bank's unlawful lending practices. Although a deprivation of tax revenue may create an injury in fact under Article III, such an injury does not fit within the unjust enrichment framework. The missing tax revenue is in no way a benefit that the City has conferred on the Bank. The City has provided no explanation for this incongruity on appeal.

Instead, the City focuses on the municipal services -- including police, firefighters, zoning ordinances, and tax laws -- that it claims it would not have had to provide if not for the Bank's predatory lending. But this version of the unjust enrichment claim fares no better, for three independent reasons. For starters, it's not clear that municipal expenditures are among the types of benefits that can be recovered by unjust enrichment under Florida law. We have found no Florida case in which a municipality recovered its expenditures on an unjust enrichment theory. Indeed, at least one case suggests that a municipality cannot recover such expenditures without express statutory authorization, which the City has never alleged. See Penelas v. Arms Tech., Inc., No. 99-1941 CA-06, 1999 WL 1204353, at *2 (Fla. Cir. Ct. Dec. 13, 1999) ("[T]he County's claim for damages, based on the costs to provide 911, police, fire and emergency services effectively seeks reimbursement for expenditures made in its performance of governmental functions. Costs of such services are not, without express legislative authorization, recoverable by governmental

entities."), aff'd, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001).

Moreover, the benefits provided by these municipal services were not directly conferred on the Bank, as is required for an unjust enrichment claim under Florida law. See, e.g., Virgilio, 680 F.3d at 1337 (affirming the dismissal of an unjust enrichment claim under Florida law because the plaintiffs only "'indirectly' conferred a benefit on Defendants"); Extraordinary Title Servs. v. Fla. Power & Light Co., 1 So. 3d 400, 404 (Fla. Dist. Ct. App. 2009) (affirming the dismissal of an unjust enrichment claim because the plaintiff "ha[d] not conferred a direct benefit" on the defendant). As the district court correctly noted, municipal police and fire services directly benefit the residents and owners of homes in the City of Miami, not the financial institution that holds the loans on those properties. And tax laws and zoning ordinances are quite clearly not direct benefits conferred on Bank of America: they are laws of general applicability that, indeed, apply to all residents of Miami. No Florida caselaw suggests that these benefits are direct enough to sustain an unjust enrichment claim.

Finally, the City has failed to allege facts to show that circumstances are such that it would be inequitable for the Bank to retain such benefits without compensation. Even assuming that these municipal services did confer a cognizable benefit on the Bank as the owner of foreclosed property, the City does not challenge the district court's determination that the Bank was legally entitled to those services. Cf. State Farm Fire & Cas. Co. v.

Silver Star Health & Rehab, 739 F.3d 579, 584 (11th Cir. 2013) ("If an entity accepts and retains benefits that it is not legally entitled to receive in the first place, Florida law provides for a claim of unjust enrichment."). The City has provided no arguments and cited no Florida caselaw explaining why the Bank would not be entitled to police and fire protection like any other property owner.

The Florida Supreme Court has not ruled on whether an unjust enrichment claim exists under these circumstances. But given the complete lack of supporting Florida caselaw, we decline to invent a novel basis for unjust enrichment under Florida law today. Accordingly, we affirm the district court's order dismissing the City's unjust enrichment claim.

IV. Conclusion

Nothing we have said in this opinion should be taken to pass judgment on the ultimate success of the City's claims. We hold only that the City has constitutional standing to bring its FHA claims, and that the district court erred in dismissing those claims with prejudice on the basis of a zone of interests analysis, a proximate cause analysis, or the inapplicability of the continuing violation doctrine.

The judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-14543-CC

CITY OF MIAMI,
a Florida Municipal Corporation,

Plaintiff - Appellant.

versus

BANK OF AMERICA CORPORATION,
BANK OF AMERICA, N.A.,
COUNTRYWIDE FINANCIAL CORPORATION,
COUNTRYWIDE HOME LOANS,
COUNTRYWIDE BANK, FSB,

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: MARCUS and WILSON, Circuit Judges,
and SCHLESINGER,* District Judge.

PER CURIAM:

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* Honorable Harvey E. Schlesinger. United States District Judge for the Middle District of Florida, sitting by designation.

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

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UNITED STATES CIRCUIT JUDGE

ORD-42

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-24506-CIV-DIMITROULEAS

CITY OF MIAMI, a Florida municipal corporation,

Plaintiff,

vs.

BANK OF AMERICA CORPORATION; BANK OF AMERICA, N.A.; COUNTRYWIDE FINANCIAL CORPORATION; COUNTRYWIDE HOME LOANS; and COUNTRYWIDE BANK, FSB,

Defendants.

_____/

ORDER GRANTING MOTION TO DISMISS

THIS CAUSE is before the Court upon a Motion to Dismiss (the "Motion") [DE 33], filed herein on February, 28, 2014 by Defendants Bank of America Corporation ("BoA"), Bank of America, N.A., Countrywide Financial Corporation, Countrywide Home Loans, and Countrywide Bank FSB ("Defendants"). Plaintiff City of Miami ("Plaintiff" or "City") has filed an Opposition [DE 37]. Both parties also filed supplemental briefing. The Court has

carefully considered the Motion [DE 33], the Plaintiffs Opposition [DE 37], the Defendants' Reply [DE 41], and the Plaintiffs Surreply [DE 48], and the oral arguments made at the June 20, 2014, hearing. The Court is otherwise fully advised in the premises.

I. BACKGROUND

This suit is brought pursuant to the Fair Housing Act of 1968 ("FHA"), as amended, 42 U.S.C. § 3601, *et seq.*, to seek redress for injuries allegedly caused by Defendants' pattern or practice of illegal and discriminatory mortgage lending. Comp. [DE 1] ¶ 2. Specifically, Plaintiff seeks injunctive relief and damages for financial injuries due to foreclosures on Defendants' loans in minority neighborhoods and to minority borrowers that are the result of Defendants' discriminatory lending practices, including both intentional discrimination and disparate impact discrimination. ¶ 2. Plaintiff alleges that beginning in 2004, Defendants began to flood historically under-served minority communities with high cost and other "predatory" loans, allegedly constituting "reverse redlining." ¶ 7.

Plaintiff alleges that Defendants engaged in both redlining and reverse redlining. ¶ 10. Plaintiff further alleges that Defendants' pattern and practice of reverse redlining has caused an excessive and disproportionately high number of foreclosures on Defendants' loans in the minority neighborhoods of Miami. ¶ 11. Plaintiff also alleges that Defendants' practice of traditional redlining has also caused an excessive and disproportionately high number of foreclosures on Defendants' loans in the minority

neighborhoods of Miami. ¶ 12. The Complaint alleges that, since 2004, Defendants have engaged in a continuing and unbroken pattern and practice of mortgage discrimination in Miami that still exists today. ¶ 10.

The Complaint further alleges that Defendants would have comparable foreclosure rates in minority and white communities if they had properly and uniformly applied underwriting practices in both areas. ¶ 13. The Complaint alleges that Defendants' practice of failing to underwrite minority borrowers' applications properly, and of putting these borrowers into loans which: (1) have more onerous terms than loans given to similarly situated white borrowers; and (2) the borrowers cannot afford, leads to foreclosures. ¶ 13.

Plaintiff's Complaint includes data and statistical analysis, as well as statements from Confidential Witnesses to support its claims. For example, a regression analysis that allegedly controls for creditworthiness and other factors is offered to show that an African-American BoA borrower was 1.581 times more likely to receive a predatory loan than a white borrower, and a Latino borrower was 2.807 times more likely to receive such a loan. ¶ 15. Plaintiff alleges that Defendants have intentionally targeted predatory practices at African-American and Latino neighborhoods and residents by targeting these neighborhoods, without regard for credit history, for high-cost loans, for increased interest rates, points, and fees, for disadvantageous loan terms, and for unfair and deceptive lending practices in connection with marketing and underwriting

mortgage loans. ¶ 163. Further, the Complaint alleges that the discretionary lending policies and practice of targeting minorities, who received predatory loan terms regardless of creditworthiness, have caused and continue to cause foreclosures in Miami. ¶ 164.

Plaintiff further alleges that the discriminatory practices and resulting foreclosures in the minority neighborhoods have inflicted significant, direct, and continuing financial harm to the City. ¶ 19. Plaintiff seeks damages based on reduced property tax revenues based on: (a) the decreased value of the vacant properties themselves; and (b) the decreased value of properties surrounding the vacant properties. ¶ 20. Plaintiff also seeks damages based on the expenditures of municipal services that have been and will be required to remedy the blight and unsafe and dangerous conditions which exist at vacant properties that were foreclosed as a result of BoA's illegal lending practices. ¶ 20.

Defendants now move to dismiss the Complaint on the grounds that (1) Plaintiff lacks standing[13]; (2) Plaintiffs FHA claim is time-barred by the statute of limitations; and (3) the Complaint fails to state a claim upon which relief can be granted. For the reasons set forth below, the Court grants Defendants' Motion to Dismiss.

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[13] In Defendants' Reply and Plaintiff's Surreply, the parties briefed the "zone of interests" issue.

II. LEGAL STANDARD

As a threshold matter, the Court must determine if jurisdiction exists before proceeding to the merits of the case. *Sinochem Int'l Co. v. Malay Int'l Shipping Corp*, 549 U.S 422, 431 (2007) ("Without jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purposes of deciding the merits of the case." (internal quotations omitted)). "The burden for establishing federal subject matter jurisdiction rests with the party bringing the claim." *Sweet Pea Marine, Ltd. v. APJMarine, Inc.*, 411 F.3d 1242, 1247 (11th Cir. 2005). Attacks on subject matter jurisdiction under Rule 12(b)(1) are either facial or factual. *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F. 3d 1256, 1260 (11th Cir. 1997). "Facial attacks on the complaint require the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in his complaint are taken as true for the purposes of the motion." *Garcia*, F. 3d at 1260 (internal quotations omitted). "Factual attacks, on the other hand, challenge the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Garcia*, F. 3d at 1261 (internal quotations omitted). However, "[w]here the jurisdictional issues are intertwined with the substantive merits, the jurisdictional issues should be referred to the merits." *Eaton v. Dorchester Dev., Inc.*, 692 F. 2d 727, 733 (11th Cir. 1982). Thus, when "an attack on subject matter jurisdiction also implicates an element of the cause of action," the

court should apply a Rule 12(b)(6) standard. *Garcia*, 104 F. 3d at 1261.

Regardless of the standard, "federal courts cannot exercise jurisdiction over cases where the parties lack standing." *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F. 3d 1296, 1302 (11th Cir. 2011). This principle exists because there is "a constitutional limitation of federal-court jurisdiction to actual cases or controversies" and "[o]ne element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1146 (2013) (internal citations and quotations omitted). To establish standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Fla. Wildlife Fed'n, Inc.*, 647 F. 3d at 1302 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-181 (2000)). "If at any point in the litigation the plaintiff ceases to meet all three requirements for constitutional standing, the case no longer presents a live case or controversy, and the federal court must dismiss the case for lack of subject matter jurisdiction." *Id.*

Where a plaintiff brings a cause of action pursuant to a federal statute, the plaintiff must establish both Article III standing and statutory standing. *See, e.g., United States v. $38,000.00 in U.S. Currency*, 816

F.2d 1538, 1544 (11th Cir. 1987). Article III of the United States Constitution requires that a litigant have standing to invoke the power of a federal court. *See supra.* In contrast, statutory standing requires the plaintiff to establish that he falls within the class of plaintiffs whom Congress has authorized to sue under that statute. *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014).

III. DISCUSSION

1. Count I: Violations of the Federal Fair Housing Act

A. Standing under the Fair Housing Act

In order to have standing for any statutory cause of action, the zone of interests and proximate causation requirements must be met. *Lexmark*, 134 S. Ct. at 1391. Upon application of the appropriate 12(b)(6) standard, this Court finds that neither requirement is met in this case.

i. Zone of Interests

The Supreme Court has made clear that the zone of interests test should be applied to any cause of action being brought under a statute. Courts are to "presume that a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" *Lexmark*, 134 S. Ct. at 1388 (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The Supreme Court has stated that the zone of interests test "applies to all statutorily

created causes of action; that it is a 'requirement of general application'; and that Congress is presumed to 'legist[e] against the background of the zone-of-interests limitation." *Lexmark*, 134 S. Ct. at 1388 (citing *Bennett v. Spear*, 520 U.S. 154, 163 (1977); *see also Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 287-288 (Scalia, J., concurring in judgment)). The test bars a plaintiffs claims when his "'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that' Congress authorized that plaintiff to sue." *Lexmark*, 134 S. Ct. at 1389 (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2210 (2012)).

The Fair Housing Act § 812 provides that after the expiration of a period for administrative remedies,

> the person aggrieved may . . . commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this subchapter, insofar as such rights relate to the subject of the complaint.

In *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 108-09 (1979), the Supreme Court held that § 812 provides "parallel remedies to precisely the same prospective plaintiffs" as does § 810.

This Court's[14] determination of whether Plaintiff has standing to sue under the FHA is guided by the

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[14] The district court in *City of Los Angeles v. Bank of America Corp.*, 2014 WL 2770083 (C.D. Cal. Jun. 12, 2014) declined to

Eleventh Circuit's opinion in *Nasser v. City of Homewood*, 671 F. 2d 432 (11th Cir. 1982). In that case, the Eleventh Circuit interpreted the FHA's zone of interests in light of the Supreme Court's decisions regarding the topic. In *Nasser*, the plaintiffs brought a claim under the FHA and claimed that they were injured by the diminution in value of their property as a result of the defendants' conduct. *Nasser*, 671 F. 2d at 436.

In deciding *Nasser*, the Eleventh Circuit considered *Trafficante v. Metropolitan Life Ins.* Co., 409 U.S. 205 (1972). In that case, the Supreme Court found that the plaintiffs, a white and a black resident of an apartment complex who alleged that they had lost the social and professional benefits of living in an integrated community, had standing and

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expand the zone of interests requirement into the analysis of standing under the FHA. *See id.* at *8 ("To the extent that Defendants argue that post- *Thompson* and post- *Lexmark*, a plaintiff needs to meet a separate 'zone of interests' requirement in order to have standing to bring a FHA claim, the Supreme Court has not yet applied that requirement to the FHA. Although the Supreme Court may explicitly require a separate 'zone of interests' statutory standing analysis under the FHA if presented with the issue in the future, this Court declines to do so here."). Unlike the district court in *City of Los Angeles*, this Court is in the Eleventh Circuit so it is bound by the Eleventh Circuit's opinion in *Nasser v. City of Homewood*, 671 F. 2d 432 (11th Cir. 1982), which does apply this requirement to the FHA. *See infra*. If it turns out that the zone of interests for purposes of standing under the FHA is as broad as Article III standing, this court's ruling may very well be different as to the zone of interests analysis, but that would not change the deficiencies in Plaintiff's allegations of proximate cause, as discussed in the following section.

were within the zone of interests protected by the FHA. The *Nasser* decision noted that, in *Trafficante*,

> The reference to 'the person aggrieved' showed 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution' . . . insofar as tenants of the same housing unit that is charged with discrimination are concerned.

Nasser, 671 F. 2d at 437 (citing *Trafficante* 409 U.S. at 209).

The Eleventh Circuit also considered *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). In *Nasser*, the Eleventh Circuit explained that the *Gladstone* decision "said that a showing of injury to the plaintiffs' community as in *Trafficante* coupled with economic injury to the value of the plaintiffs' homes was sufficient to establish standing under the Fair Housing Act." *Nasser*, 671 F. 2d at 437 (citing *Gladstone*, 441 U.S. at 114-15). However, the Eleventh Circuit continued:

> There is no indication that the Court intended to extend standing, beyond the facts before it, to plaintiffs who show no more than an economic interest which is not somehow affected by a racial interest. There is no suggestion, either in the Act or its legislative history, that Congress intended to entrust the enforcement of the Fair Housing Act to such plaintiffs.

Nasser, 671 F. 2d at 437. Accordingly, the Eleventh Circuit held that the property owner plaintiffs lacked standing under the FHA: "The policy behind the Fair

Housing Act emphasizes the prevention of discrimination in the provision of housing on the basis of 'race, color, religion, sex, or national origin.' . . . Simply stated, the plaintiffs offered no evidence that they possess 'rights granted' by the Fair Housing Act. Their interest in value of the property in no way implicates values protected by the Act." *Nasser*, 671 F. 2d at 437.

In this case, the Plaintiff alleges merely economic injuries. [DE 1] ¶¶ 133-159. Plaintiff prays for relief for economic injury from the reduction in tax revenue from the decrease in property values. ¶¶ 133-150. The Plaintiff also prays for relief for injury caused by direct expenditures that the City spent due to the foreclosures. ¶¶ 151-159. Neither of these economic injuries is "somehow affected by a racial interest." In fact, the injury alleged here is very similar to the injury decided to be outside of the FHA's zone of interests in *Nasser:* an economic loss from a decrease in property values.

The policy and purpose of the Fair Housing Act is to "provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C.A. § 3601. The City's complaints of decreased tax revenue and increased municipal services are "so marginally related to . . . the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit suit." *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011). Therefore, this Court finds that the City of Miami's claims fall outside of the zone of interests protected by the FHA; Plaintiff lacks standing to sue under the statute.

ii. Proximate Causation

Courts are also generally to "presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Lexmark*, 134 S. Ct. at 1390. "The judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 536 (1983). "Proximate-cause analysis is controlled by the nature of the statutory cause of action. The question it presents is whether the harm alleged has a sufficiently close connection to the conduct the statute prohibits." *Lexmark*, 134 S. Ct. at 1390. As the Supreme Court explained, "the proximate-cause requirement generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct. That is ordinarily the case if the harm is purely derivative of 'misfortunes visited upon a third person by the defendant's acts.'" *Id.* (citing *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268-269 (1992)). A plaintiff lacks standing where a causal chain is too attenuated and relies on the conduct of third parties. *See Wehunt v. Ledbetter*, 875 F. 2d 1558, 1566-67 (11th Cir. 1989).

In this case, upon consideration of the allegations of the City's Complaint, the Court holds that proximate causation for standing is not adequately alleged. In order to establish proximate causation, Plaintiff must demonstrate that the Defendants' alleged redlining and reverse redlining caused the foreclosures to occur. Here, Plaintiff does not allege facts that isolate Defendants' practices as the cause

of any alleged lending disparity. Against the backdrop of a historic drop in home prices and a global recession, the decisions and actions of third parties, such as loan services, government entities, competing sellers, and uninterested buyers, thwart the City's ability to trace a foreclosure to Defendants' activity. The independent actions of this multitude of non-parties break the causal chain. *See Fla. Family Policy Council v. Freeman*, 561 F. 3d 1246, 1253 (11th Cir. 2009) (casual chain cannot rely on "independent action of some third party not before the court").

Even if this first step of proximate causation were shown, Plaintiff would then have to complete the causal connection in its claim by demonstrating that the foreclosures caused the City to be harmed. Instead, the City offers vague and generalized allegations of harm (Comp. ¶¶ 53, 61, 75, 103, 109), statistics and studies that are either not limited to the City of Miami (Comp. ¶¶ 78 (relying on data from Chicago); 84-85 (relying on nationwide data); 16, 37-41, 8081, 87-88, 110-12), not limited to Defendants' practices (Comp. ¶¶ 11, 19, 22, 80-85, 87-88, 110-11), or do not control for relevant credit factors that undoubtedly affect lending practices (Comp. ¶¶ 119-22; 11, 107-08, 124-25). Although statistical correlations are asserted, they are insufficient to support a causation claim. Moreover, Defendants are not responsible for the actions of intervening actors such as squatters, vandals or criminals that damaged foreclosed properties causing the City's municipal costs to rise. Plaintiffs claim is entirely derivative, emphasizing how inextricably linked the

possible effect of reverse redlining is with other economic forces acting upon the market.

B. Statute of Limitations

While the Court is dismissing this action for lack of standing, *see supra*, it also holds that the Complaint is subject to dismissal on statute of limitations grounds.

A limitations clock begins to run "as soon as facts supportive of the cause of action are or should be apparent to a reasonably prudent person similarly situated." *Telesca v. Vill. of Kings Creek Condo. Ass'n*, 390 F. App'x 877, 882 (11th Cir. 2010). For purposes of the FHA, "[a]n aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or termination of an alleged discriminatory . . . housing practice . . . to obtain appropriate relief with respect to such discriminatory housing practice . . . ." 42 U.S.C. § 3613(a)(1)(A). An FHA claim for extending a discriminatory loan begins to run from the date of the loan closing. *Id.*; *Phan v. Accredited Home Lenders Holding Co.*, 2010 WL 1268013, at *3 (M.D. Fla. Mar. 20, 2010). This suit was filed December 13, 2013. *See* [DE 1]. However, of the ten specific loans securing the identified properties alleged in the Complaint, Plaintiff fails to allege that any of those loans were made later than 2008. Comp. ¶ 160. There are no allegations of specific loans in the Complaint that are alleged to have closed in the two years leading up to the date the suit was filed. Comp. ¶ 160.

While Plaintiff argues that their claim is not time-barred pursuant to the continuing violation doctrine, Plaintiff has failed to allege sufficient facts to support its conclusory allegation that the specific discriminatory loan practices complained of continued into the statutory period. The Complaint contains no allegations of any loan that was closed within the relevant limitations period. Moreover, the Complaint alleges several different types of discriminatory actions or practices in which Defendants engaged, such as redlining and reverse redlining. However, the City has not alleged facts evidencing that each type of alleged discriminatory practice continued into the limitations period.[15] Rather the Complaint merely alleges a generalized policy of discrimination, which is insufficient to state a FHA claim.

2. Count II: Unjust Enrichment

When one party has conferred a valuable benefit on another in the absence of a contract, either express or implied, the doctrine of unjust enrichment creates a fictional contract, sometimes called a quasi-contract or contract implied in law, to the extent necessary to avoid clear injustice. *Adventist Health System/Sunbelt Inc. v. Medical Sav. Ins. Co.*, 2004 WL 6225293 at *6 (M.D. Fla. Mar. 8, 2004). Under

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[15] The City does not allege a uniform practice of continuing conduct—that is, a particular form of discrimination by a single actor—that was the type of "discrete unlawful practice" that "continued" and so could be a basis for application of the continuing violations doctrine. *Smithers v. Wynne*, 319 F. App'x 755, 757 (11th Cir. 2008).

Florida Law, a claim for unjust enrichment has three elements: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant voluntarily accepted and retained that benefit; and (3) the circumstances are such that it would be inequitable for the defendants to retain it without paying the value thereof. *Virgilio v. Ryland Group, Inc.*, 680 F. 3d 1329, 1337 (11th Cir. 2010) (citing *Fla. Power Corp. v. City of Winter Park*, 887 So. 2d 1237, 1241 n. 4 (Fla. 2004)). The benefit must be conferred directly. *Century Senior Serv. v. Con. Health Benefit Ass*, 770 F. Supp. 2d 1261, 1267 (S.D. Fla. 2011). Moreover, the benefit accepted by defendants must be one that defendants were "not legally entitled to receive in the first place." *State Farm Fire Cas. Co. v. Silver Star Health and Rehab*, 739 F. 3d 579, 584 (11th Cir. 2013). Finally, the scope of damages is assessed in terms of the value of the benefit conferred upon the recipient, not the cost to the provider of producing that benefit and the fair market value of it. *Tooltrend, Inc. v. CMT Utensili, SRL*, 198 F.3d 802, 807 n. 5 (11th Cir. 1999).

Here, Plaintiff does not allege sufficient facts to support its unjust enrichment claim. As a preliminary matter, Plaintiffs unjust enrichment claim fails due to the same insufficient causal allegations that were fatal to Plaintiffs FHA claim. Plaintiff alleges that the Defendants were enriched at the City's expense by utilizing benefits conferred by the City "[a]s a direct and proximate result of Defendants' predatory lending practices." Comp. ¶ 174. However, Plaintiff fails to adequately allege the requisite causal connection between the terms of

Defendants' loans and the City's decreased tax revenue and increased municipal services. *See supra.*

Moreover, the City does not allege that it conferred a direct benefit onto Defendants to which they were not otherwise legally entitled. First, Plaintiff fails to allege that the City conferred any *direct* benefit on the Defendants. "[Den]ying the City revenues it had properly expected through property and other tax payments" is certainly not a direct benefit conferred from the City to Defendants. *See* Comp. ¶ 174. Additionally, the municipal services allegedly provided in the Complaint benefit property owners and residents of the City of Miami. Comp. ¶ 172. Plaintiff alleges that Defendants were aware of and took advantage of the services and laws provided by the City of Miami in order to further their business. Comp. ¶ 173. However, any benefit received by Defendants in this manner would be derivative and insufficient for an unjust enrichment claim. *Century Senior*, 770 F. Supp. 2d at 1267. Next, Plaintiff fails to allege sufficient facts that demonstrate that the City conferred any benefit on the Defendants *to which they were not legally entitled.* Municipal services provided by the City are benefits accruing to the public at large. Plaintiff fails to allege facts to show that the Defendants, to the extent that they owned property in the City of Miami, were not also entitled to the benefit of these municipal services. Although Plaintiff argues that the City paid for Defendants' externalities and this constitutes unjust enrichment, this Court disagrees with this position. *See e.g., Adventist Health Sys.*, 2004 WL 6225293 at *6 n. 8 (M.D. Fla. March 8, 2004) (dismissing unjust enrichment claim because "[e]quity has never

required compensation for positive externalities."). For the above reasons, this Court dismisses Plaintiffs Count II: Unjust Enrichment.

IV. CONCLUSION

Based upon the foregoing, it is **ORDERED AND ADJUDGED** as follows:

1. Defendants' Motion to Dismiss [DE 33] is hereby **GRANTED;**

2. Count I Violation of the FHA is hereby **DISMISSED WITH PREJUDICE**[16]**;**

3. Count II - Unjust enrichment is hereby **DISMISSED WITHOUT PREJUDICE.**[17]

DONE AND ORDERED in Chambers at Ft. Lauderdale, Broward County, Florida, this 8th day of July, 2014.

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[16] While it is possible that an amendment could remedy the statute of limitations problems the Court has identified with Plaintiff's Complaint, it would not remedy the Plaintiff's lack of standing to bring this action under the FHA.

[17] While it does not appear that Plaintiff can overcome the deficiencies in its claim for unjust enrichment, in an abundance of caution, the Court will dismiss this count without prejudice, with leave to amend in accordance with the analysis set forth this Order. If Plaintiff chooses to file an amended complaint, the deadline to do so is July 21, 2014. As currently pled, Plaintiff's unjust enrichment claim is pled as a supplemental jurisdiction state law claim. The Court takes no position, at this time, as to whether it would exercise supplemental jurisdiction over a complaint that only contains a state law claim.

WILIAM P. DIMITROULEAS
United States District Judge

Copies to: Counsel of record

APPENDIX D

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

CASE NO. 13-24506-CIV-DIMITROULEAS

CITY OF MIAMI, a Florida municipal corporation,

Plaintiff,

vs.

BANK OF AMERICA CORPORATION; BANK OF AMERICA, N.A.; COUNTRYWIDE FINANCIAL CORPORATION; COUNTRYWIDE HOME LOANS; and COUNTRYWIDE BANK, FSB,

Defendants.

_____/

ORDER DENYING MOTION FOR RECONSIDERATION

THIS CAUSE is before the Court upon Plaintiff City of Miami ("Plaintiff" or "City")'s Motion for Reconsideration and Leave to File First Amended Complaint, filed herein on July 21, 2014. [DE 72]. The Court has carefully considered the Motion [DE 72], Defendants Bank of America Corporation ("BoA"), Bank of America, N.A., Countrywide Financial Corporation, Countrywide Home Loans,

and Countrywide Bank FSB ("Defendants")'s Opposition [DE 74], Plaintiff's Reply [DE 75], and is otherwise fully advised in the premises.

On December 13, 2013, Plaintiff filed this suit pursuant to the Fair Housing Act of 1968 ("FHA"), as amended, 42 U.S.C. § 3601, *et seq.*, to seek redress for injuries allegedly caused by Defendants' pattern or practice of illegal and discriminatory mortgage lending. [DE 1]. Specifically, Plaintiff sought injunctive relief and damages for financial injuries due to foreclosures on Defendants' loans in minority neighborhoods and to minority borrowers that were the result of Defendants' discriminatory lending practices. Plaintiff sought damages based on reduced property tax revenues based on: (a) the decreased value of the vacant properties themselves; and (b) the decreased value of properties surrounding the vacant properties. Plaintiff also sought damages based on the expenditures of municipal services that have been and will be required to remedy the blight and unsafe and dangerous conditions which exist at vacant properties that were foreclosed as a result of Defendants' illegal lending practices.

Defendants moved to dismiss the Complaint on the grounds that Plaintiff lacked standing under the FHA, Plaintiffs FHA claim was time-barred by the statute of limitations, and the Complaint failed to state a claim upon which relief can be granted. After extensive briefing and oral argument, the Court entered an Order Granting Motion to Dismiss on July 8, 2014. *See* [DE 71].

Therein, the Court held that the City did not meet the zone of interests nor the proximate causation requirements for standing to sue under the FHA. *See Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014). In making that ruling, the Court was guided by the Eleventh Circuit's opinion in *Nasser v. City of Homewood*, 671 F. 2d 432 (11th Cir. 1982). The policy and purpose of the Fair Housing Act is to "provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C.A. § 3601. After a thorough review of the Complaint, the Court explained that Plaintiff alleged merely economic injuries -- Plaintiff sought relief for economic injury from the reduction in tax revenue from the decrease in property values and for injury caused by direct expenditures that the City spent due to the foreclosures. The Court held that neither of these economic injuries is "somehow affected by a racial interest." Thus, the Court found that the City of Miami's claims fell outside of the zone of interests protected by the FHA, as the City's complaints of decreased tax revenue and increased municipal services are "so marginally related to . . . the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit suit." *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863, 870 (2011). Additionally, the Court held that proximate causation for standing was not adequately alleged, as Plaintiffs allegations failed to demonstrate that the Defendants' alleged practices of redlining and reverse redlining caused the foreclosures to occur. Further, the Court noted that the independent actions of a multitude of non-parties

-- a historic drop in home prices and a global recession, the decisions and actions of third parties, such as loan services, government entities, competing sellers, and uninterested buyers -- break the causal chain, thwarting the City's ability to trace a foreclosure to Defendants' activity. *See Fla. Family Policy Council v. Freeman*, 561 F. 3d 1246, 1253 (11th Cir. 2009) (casual chain cannot rely on "independent action of some third party not before the court"). Moreover, the Court held that Plaintiffs offered vague and generalized allegations of harm, failing to allege facts demonstrating that the foreclosures caused the City to be harmed. Finally, the Court held that the Complaint was also subject to dismissal on statute of limitations grounds, as the Complaint contained no allegations of any loan that was closed within the relevant limitations period. The Complaint merely alleged a generalized policy of discrimination, failing to allege facts evidencing that each type of alleged discriminatory practice continued into the limitations period. The Court dismissed Count I, violation of the FHA, with prejudice, explaining that, while it is possible that an amendment could remedy the statute of limitations problems the Court identified with Plaintiffs Complaint, it would not remedy the Plaintiffs lack of standing to bring this action under the FHA.

The Court's July 8, 2014 Order Granting Motion to Dismiss also held that Plaintiff failed to allege sufficient facts to support its unjust enrichment claim. That claim suffered the same insufficient causal allegations that were fatal to Plaintiffs FHA claim. Moreover, the City failed to allege sufficient facts demonstrating that the City conferred any

benefit on the Defendants to which they were not legally entitled. The Court dismissed Count II, unjust enrichment, without prejudice with leave to amend in accordance with the Court's Order.

Rather than appeal the Court's July 8, 2014 Order Granting Motion to Dismiss challenging this Court's application of *Lexmark* and *Nassar* to the City's FHA claim, or file an amended complaint as to Plaintiff's unjust enrichment claim in accordance with the dismissal Order, Plaintiff has moved for reconsideration.

"[R]econsideration of a previous order is an extraordinary remedy to be employed sparingly." *Burger King Corp. v. Ashland Equities, Inc.*, 181 F. Supp. 2d 1366, 1370 (S.D. Fla. 2002) (citing *Mannings v. School Board of Hillsborough County*, 149 F.R.D. 235, 235 (M.D. Fla. 1993)). For a court to reconsider its prior judgment the moving party must present facts or law of a "strongly convincing nature" that would induce a court to reverse its prior decision. *Id.* (citing *Sussman v. Salem Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla 1994)). Three major grounds justify reconsideration: "(1) an intervening change in the controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice." *Burger King*, 181 F. Supp. 2d at 1369. "A motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (internal quotation marks omitted).

Plaintiff has not presented strongly convincing arguments in the instant reconsideration Motion that would cause the Court to reconsider its prior Order. The arguments in the Motion are ones that the Plaintiff already made or that it could have, but chose not to, in the extensive process of briefing, supplemental briefing, and oral argument related to Defendants' Motion to Dismiss. Arguing that this Court's reasoning was flawed is not enough for a motion for reconsideration. Furthermore, to the extent that the Plaintiff alternatively seeks to amend its FHA claim to assert it has a generalized non-economic interest in having an integrated community and in racial diversity -- claims it never made and amendments it did not previously raise or offer despite ample opportunity -- these new matters are improperly raised as grounds for reconsideration.[18]

Finally, regarding Plaintiffs unjust enrichment claim, the Court stated in its July 8, 2014 Order Granting Motion to Dismiss:

> While it does not appear that Plaintiff can overcome the deficiencies in its claim for unjust enrichment, in an abundance of caution, the Court will dismiss this count without prejudice,

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[18] Moreover, sprinkling in allegations that the City has a generalized interest in racial integration falls far short of alleging facts sufficient to demonstrate that Defendants' lending practices adversely affected the racial diversity or integration of the City, nor do those generalized allegations appear to be connected in any meaningful way to the purported loss of tax revenue and increase in municipal expenses allegedly caused by Defendants' lending practices.

> with leave to amend in accordance with the analysis set forth in this Order. If Plaintiff chooses to file an amended complaint, the deadline to do so is July 21, 2014. As currently pled, Plaintiffs unjust enrichment claim is pled as a supplemental jurisdiction state law claim. The Court takes no position, at this time, as to whether it would exercise supplemental jurisdiction over a complaint that only contains a state law claim.

See case no. 13-24506 at [DE 71], p. 14, n. 2. Thus, the Court has already granted Plaintiff permission to file an amended complaint as to its unjust enrichment claim. If Plaintiff chooses to file such an amended complaint, the Court will extend the deadline to do so until September 15, 2014. Any arguments Defendants have raised in the instant briefing regarding the sufficiency of the unjust enrichment claim set forth in Plaintiffs proposed amended complaint may be reasserted in response to the amended complaint, if one is timely filed.

Based upon the foregoing, it is **ORDERED AND ADJUDGED** that Plaintiffs Motion for Reconsideration and Leave to File First Amended Complaint [DE 72] is **DENIED.**

DONE AND ORDERED in Chambers at Ft. Lauderdale, Broward County, Florida, this 8th day of September, 2014.

WILLIAM P. DIMITROULEAS
United States District Judge

APPENDIX E

42 U.S.C. § 3613 provides:

Enforcement by private persons

(a) Civil action

(1) (A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(B) The computation of such 2-year period shall not include any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

(2) An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 3610(a)

of this title and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement with the consent of an aggrieved person, no action may be filed under this subsection by such aggrieved person with respect to the alleged discriminatory housing practice which forms the basis for such complaint except for the purpose of enforcing the terms of such an agreement.

(3) An aggrieved person may not commence a civil action under this subsection with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this subchapter with respect to such charge.

(b) Appointment of attorney by court

Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may-

(1) appoint an attorney for such person; or

(2) authorize the commencement or continuation of a civil action under subsection (a) of this section without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

(c) Relief which may be granted

(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

(d) Effect on certain sales, encumbrances, and rentals

Relief granted under this section shall not affect any contract, sale, encumbrance, or lease consummated before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the filing of a complaint with the Secretary or civil action under this subchapter.

(e) Intervention by Attorney General

Upon timely application, the Attorney General may intervene in such civil action, if the Attorney General certifies that the case is of general public importance. Upon such intervention the Attorney General may obtain such relief as would be available to the Attorney General under section 3614(e) of this title in a civil action to which such section applies.

42 U.S.C. § 3602 provides:

Definitions

As used in this subchapter--

* * * * *

(i) "Aggrieved person" includes any person who--

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

* * * * *

42 U.S.C. § 2000e-5 provides:

Enforcement provisions

* * * * *

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

> (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General

who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the

court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and

to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief

judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

* * * * *